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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-875

MYRTLE GREEN BURTON, Individually and in her Capacity as Representative of JAMES EARL GREEN, Deceased, et al.,

Petitioners,

v.

WILLIAM L. WALLER, Individually and as Governor of the State of Mississippi, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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October Term, 1974

No. 74-

MYRTLE GREEN BURTON, Individually and in her Capacity as Representative of JAMES EARL GREEN, Deceased, et al.

Petitioners,

v.

WILLIAM L. WALLER, Individually and as Governor of the State of Mississippi, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Myrtle Green Burton, Dale A. Gibbs, Tuwaine Davis Whitehead, Vernon Steven Weakley and Leroy Kenter, Jr., respectfully pray that a writ of certiorari issue to review the final judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on October 18, 1974, which affirmed in all respects a judgment entered against them by the United States District Court for the Southern District of Mississippi.

Introduction

Plaintiffs sought damages for the deaths of two black persons and injuries to three others from a barrage of gunfire directed at a women's dormitory on the campus of Jackson State College, a virtually all-black college in Jackson, Mississippi, on May 15, 1970, by a contingent of 69 officers from the Mississippi Highway Safety Patrol (MHP) and the Jackson Police Department (JPD).

The case was tried before an all-white jury in the United States District Court for the Southern District of Mississippi. The jury found for all defendants against all plaintiffs. Motions for directed verdicts and judgments notwithstanding the verdicts were denied and petitioners appealed from the denial of those motions.

The Court of Appeals, resolving "all reasonable inferences in favor of defendants", *Burton* v. *Waller*, 502 F.2d 1261, 1266 (5th Cir. 1974) and assuming that a jury could have found that one or two shots from a small caliber pistol were fired at the officers from a window near the top of Alexander Hall, a five-story women's dormitory,* held nevertheless that the officers' firing was "an excessive cumulated use of deadly force", *id.* at 1272, and:

> "The barrage of gunfire far exceeded the response that was appropriate for a disturbance of the size of this one and under the circumstances which it faced. This conclusion is not judicial second guessing of officers faced with danger, rendered from the quiet and safety of judges' chambers. It is what the evidence shows. The testimony touching

*As we indicate below (pp. 11-12), there is substantial reason to reject that testimony as incredible, but for the purpose of argument only we assume it to be true because it makes no difference to the result to which we believe petitioners are entitled—judgment as a matter of law. We took precisely the same position below and did not "concede", as the Court of Appeals said, 502 F.2d at 1269 n.3, that the jury could so find.

> the issue of appropriate response from a large detachment coming under sniper fire uniformly rejected as unacceptable the barrage that took place at Jackson State." *Id.* at 1271-72.

Moreover, in the case of seven particular officers, the Court of Appeals held that "they were guilty of tortious conduct as a matter of law". *Id.* at 1286. Equally, it condemned the reaction of the entire mass of officers when it found that "on the night of May 15 there ensued a confused mass reaction during which, as the supervisory officers acknowledged, they lost control of the men under their supervision". *Id.* at 1285.

We have reproduced on the facing page a copy of PX-45 (which also appears at 502 F.2d at 1266) and have marked it to show where the dead and wounded were shot*—far from the supposed sniper whose alleged location is also indicated on the marked copy of PX-45. As the Court found:

> "Under the evidence, the fire was excessive in volume and in intensity, and the size of the area subjected to fire was beyond the physical limits of [any] justifiable response." *Id.* at 1272.

The intensity of the firing into that crowded women's dormitory is demonstrated by examination of PX-133 (a close-up of the West Wing of Alexander Hall taken the

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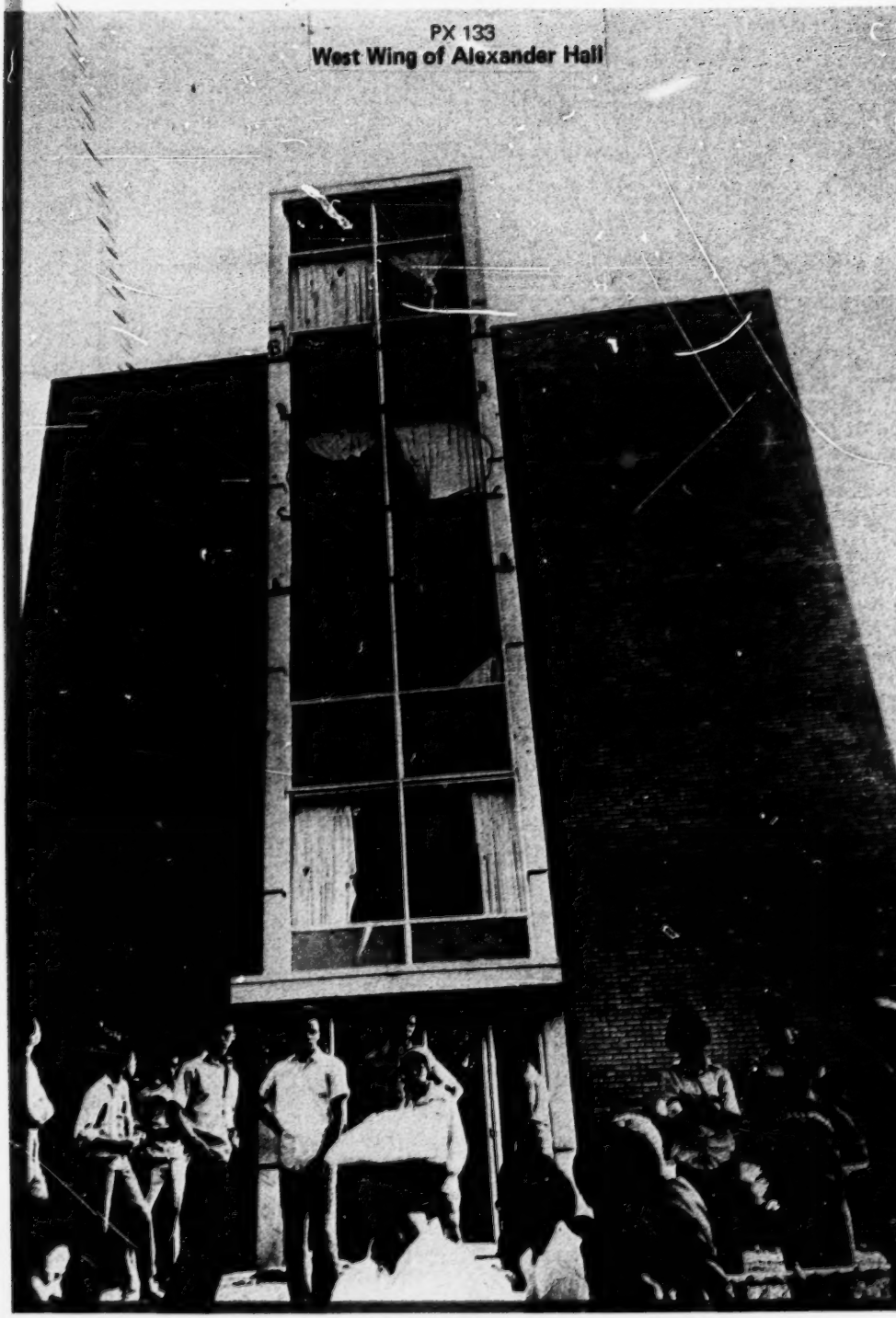
*Petitioners or their decedents have been located as indicated in the Court of Appeals' opinion, 502 F.2d at 1271, as has been the "sniper", *id.* at 1269, while the other victims have been located by trial testimony. (Tr. 445, 531-34, 751-56, 814, 831-32, 848-51, 896-97.) The 43 Mississippi Highway Safety Patrolmen were clustered in the street in front of the West Wing of Alexander Hall, approximately between the spot indicated as the location of R. Wilson and the alleyway to the left of the West Wing on PX-45. The JPD officers were just to the east (right) of them. A large armored vehicle, Thompson's Tank, was stopped directly in front of the West Wing in the middle of the police contingent. (PX-184, Tr. 2794.)

PX 45

Scene of the Barrage
(Marked to Indicate Location of Victims
and the Alleged Sniper)

4

PX 133
West Wing of Alexander Hall



day after the shooting) which has been set out following PX-45.*

Despite these conclusions, the Court of Appeals failed to hold any person or entity liable.

Opinions Below

The opinion of the Court of Appeals is reported at 502 F.2d 1261 (5th Cir. 1974), and is set out in Appendix C.

The District Court orally denied petitioners' motions for judgments notwithstanding the verdicts on April 5, 1972. See Appendix D.

Jurisdiction

The judgment of the Court of Appeals was entered on October 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

In light of the Court of Appeals' findings which (with "all reasonable inferences in favor of defendants") establish that:

First, the "barrage of [police] gunfire" which caused the deaths and injuries constituted "an excessive cumulated use of deadly force";

Second, those shooting violated the "standards generally accepted by law enforcement agencies" and disobeyed specific cease fire orders;

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*Larger copies of both PX-45 and PX-133 have also been filed with the Clerk as exhibits to this petition.

Third, at least seven officers "were guilty of tortious conduct as a matter of law" and all 43 officers who shot contributed to an "excessive" and "confused mass reaction";

Fourth, petitioners or their decedents were innocent bystanders shot far outside the "physical limits of [any] justifiable response"—

The principal questions are:*

1. Whether petitioners can be left without any remedy for damages resulting from death and injury in a suit under the Constitution, the Civil Rights Acts of 1866 and 1871, and Mississippi law, and specifically

(a) Whether individual police officers can escape liability because the magnitude of their collective wrongdoing makes it impossible to determine which particular officers fired the shots which caused the deaths and injuries complained of?

(b) Whether the "excessive cumulated use of deadly force" causing these deaths and injuries outside the "physical limits of [any] justifiable response" can be "justified" on theories either of suppression of riot (which the defense expressly rejected as a justification) or of self-defense?

(c) Whether it is the law that black students in Mississippi can be held to have "assumed the risk" that white police officers would, without warning, suddenly engage in a wrongful "confused mass reaction" resulting in "an excessive cumulated use of deadly

*In the event certiorari is granted, petitioners will urge other questions, properly preserved and presented to the Court of Appeals, as grounds for reversal. These questions relate to the instructions to the jury and are listed in Appendix I.

force" directed far outside the "physical limits of [any] justifiable response"?

2. Whether a state or municipality can be excused from liability for the wrongful acts of its agents under these circumstances on the theory of sovereign immunity when petitioners' claims arise under the Fourteenth Amendment, which was enacted specifically to limit the sovereignty of the states over precisely those federal civil rights of petitioners which were violated?

Constitutional Provisions Involved

The constitutional provisions involved are the Supremacy Clause (Article VI, Clause 2) and the Eleventh and Fourteenth Amendments, set forth in Appendix A.

Statutory Provisions Involved

The statutory provisions involved are (a) Section 1 of the Civil Rights Act of 1871 (42 U.S.C. § 1983) and Section 3 of the Civil Rights Act of 1866 (42 U.S.C. § 1988); (b) the Mississippi Wrongful Death Act [Miss. Code Ann. § 1453 (1942) (now Miss. Code Ann. § 11-7-13 (1972))]; and (c) 28 U.S.C. §§ 1331, 1343. All statutory provisions are set forth in Appendix B.

Statement of the Case

1. *The Petitioners.* Petitioners are the survivors of two young men killed at Jackson State and three students who were wounded. Myrtle Green Burton represents her dead son, James Earl Green—a 17-year-old high school student. Phillip L. Gibbs, a 21-year-old Jackson State student when he was killed, is survived by his wife, peti-

tioner Dale A. Gibbs, and two children. Tuwaine Davis Whitehead and Vernon Steven Weakley were both 19-year-old Jackson State students when shot, while Leroy Kenter, Jr., was a 20-year-old sophomore.*

2. *The Defendants.* The original defendants were (i) all 69 officers in the detachment from which the gunfire came (43 from MHP and 26 from the JPD); (ii) various officials, not present at the scene, who had supervisory and training authority; and (iii) the State of Mississippi and the City of Jackson.

Four MHP and 20 JPD officers who testified they did not fire were dismissed from the suit on petitioners' motion (except for two supervisors at the scene who remained as defendants). Additional individual defendants who were not present at the scene of the shootings, including former Mississippi Governor Williams, were dismissed from the action before or during trial on petitioners' motion.** The only remaining individual party not present at the shooting is Giles Crisler, Mississippi Commissioner of Public Safety and head of the MHP.†

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*The suit was brought under the Fourteenth and other amendments to the Constitution, 42 U.S.C. § 1983, the Mississippi Wrongful Death Act, Miss. Code Ann. § 1453 (1942) [now Miss. Code Ann. § 11-7-13 (1972)] and the Mississippi common law. Federal jurisdiction is conferred by the Fourteenth Amendment, 42 U.S.C. §§ 1983, 1988 and 28 U.S.C. §§ 1331, 1343. The federal court has jurisdiction over the state claim because it and the federal claims arise from the same nucleus of operative facts. *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 725 (1966); *see Rosado* v. *Wyman*, 397 U.S. 397, 402-05 (1970); *Burton* v. *Waller*, 502 F.2d 1261, 1265 n.1 (5th Cir. 1974).

**The Court of Appeals kept the Governor in the caption and substituted the name of the current Governor.

†Crisler was responsible for the MHP firearms control training the Court of Appeals found "clear[ly]" "deficient". 502 F.2d at 1285. But the Court then held the jury might have found that Crisler used "due care". *Id.*

3. *The Witnesses.* In addition to their own testimony, petitioners offered the testimony of 96 witnesses,* including eleven Jackson State students and 69 officers at the scene.

The FBI made an exhaustive investigation of the Jackson State shootings and detailed study of the effects of the barrage. 502 F.2d at 1271. Testimony of four agents and one other employee of the Federal Bureau of Investigation also offered by petitioners set forth the results of that investigation and established that the firing originated "where the MHP patrolmen had been clustered". *Id.* Based on the physical evidence of the extent and effects of the barrage, the Court of Appeals concluded that "the size of the area subjected to fire was beyond the physical limits of [any] justifiable response". *Id.* at 1271-72.

In addition, petitioners called an independent expert on crowd control procedures and the officials in charge of training for the JPD, the MHP and the Mississippi National Guard. Each of these witnesses "uniformly", *id.*, supported the Court's conclusion that the barrage of firepower was "excessive" and "unacceptable", *id.*, because, as stated by defendants' own expert training officers:

> "[W]hen you open up on a group of people, a lot of innocent people become involved in fire power". (Tr. 2827-28)

4. *The Shootings.* Petitioners contend that the facts set forth by the Court of Appeals establish liability as a matter of law. The facts were stated "with all reasonable inferences in favor of defendants". 502 F. 2d at 1266.

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*Defendants offered the testimony of only two witnesses, who added little, if anything, to the testimony previously presented by the plaintiffs.

Nevertheless, the opinion of the Court of Appeals makes it clear that innocent people were killed and wounded because of the "excessive cumulated use of deadly force"—a barrage fired at point blank range [10 yards to the students at ground level (Tr. 1790-91)] at students who were obeying an order to disperse, and a barrage which continued despite repeated orders to cease fire. 502 F. 2d at 1270.

At the trial, the testimony differed on only one major issue (resolution of which is not necessary)—whether a lone sniper in the second window from the top of the West Wing of the women's dormitory fired at most one or two shots from a small caliber pistol at the officers just before they unleashed their barrage.

Petitioners submit that their own testimony, that of student witnesses, the physical facts uncovered by the FBI,* the striking failure of any of the officers to seek readily available cover,** or even to look for a sniper after the shooting was over, and the instantaneous decision by the officer in charge to order a cease fire, 502 F.2d at 1270,

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*As a justification for its conclusion that a jury could have found there was a sniper, the Court of Appeals set out testimony that "[a]t least 18 patrolmen testified to seeing two or three muzzle flashes come from the eastern pane" of the large window second from the top of the dormitory. *Id.* at 1270. *But,* on the next page, the Court sets out the incontrovertible physical facts stemming from the FBI report, proving this testimony was false. Without comment, the Court states:

> "[T]he eastern portion of the second window from the top, the pane behind which the sniper had been located by the testimony and at which numerous patrolmen had directed their fire, was unmarred". *Id.* at 1271. (Footnote omitted)

Since that window could not be opened (Tr. 1795), it is plain that no one fired out of that portion of the pane or into it.

**Not a single officer stepped behind its protective cover of the adjacent "Thompson's Tank", a JPD armored truck over 23 feet long and 8 feet high. (Tr. 1202)

proved as conclusively as it is ever possible to prove a negative that any testimony about a sniper cannot be credited. But, for purposes of seeking judgment notwithstanding the verdict, we have assumed (as did the Court of Appeals) that a jury could have found that a sniper in the second window from the top of the West Wing of the dormitory did fire those one or two shots.

The point is that, whether or not there was any such lone sniper, the deaths and injuries here were tragically unlawful. *First,* petitioners (with one possible exception) were nowhere near the site of the alleged sniper. They were innocent bystanders and no one even tried to justify shooting in their direction. Plainly, such shooting was outside "the physical limits of [any] justifiable response". *Id.* at 1272. *Second,* the outside experts, the men's own training officers, and the commanding officers at the scene all agreed that such an undisciplined barrage of gunfire was excessive and improper even if (contrary to fact) it had been solely directed at the location of the alleged sniper.

The facts, established by the Court of Appeals' findings, which require a judgment of liability include the following:

a. As the Court found, the "barrage of gunfire" was *an "excessive cumulated use of deadly force".* Shortly before midnight on May 14, 1970, a contingent of 69 officers marched down Lynch Street, a major road (shown in the foreground of PX-45, p. 4, *supra*) which bisects the Jackson State campus.* Students followed the march.

*The officers were on the campus because of student disturbances which had occurred earlier that night. There had been disturbances the previous night which had included verbal abuse, rock throwing, the burning of some trash containers, and an attempt to burn the Army ROTC building. The crowds dispersed (without gunfire). After an ordinary day of college activities, disturbances broke out again on the evening of May 14. There was rock throwing and a privately-owned dump truck was set afire. In addition, one officer (Inspector Lloyd Jones), but none of the other officers present,

By the time the police contingent reached the West Wing of Alexander Hall (shown at the center of PX-45, p. 4, *supra*), there was a crowd of three or four hundred students in the street and in front of the West Wing. It was "unruly". 502 F. 2d at 1269.

Lieutenant Magee, the commanding officer, halted the march and "used his bullhorn to order the students to disperse, and the crowd began complying". *Id.* But because the students had to pass through a narrow gate, the process of dispersion went slowly and while the officers waited, "more objects were thrown at them, and Lt. Magee was hit by one of the missiles". *Id.* Nevertheless, because the students " 'were withdrawing from the street area and dispersing' ", *id.*, Lt. Magee did not consider it necessary to use any form of physical force, including tear gas, because " 'the people were complying with my request' ". *Id.*

At this point, 38 MHP patrolmen and 5 JPD policemen almost simultaneously opened fire at a distance of less than twenty yards; they "panned" the obviously crowded women's dormitory from top to bottom. (Tr. 2547-49) Their firing raked the dormitory, its center section, and its East Wing. The area of their firing even included the opposite side of Lynch Street where James Earl Green was killed. 502 F.2d at 1270-71.

Their weapons included shotguns,* "personal" military

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testified that before he arrived on campus he had heard that a fire truck was fired on. (Tr. 2422-23) After a bottle was subsequently thrown at a group of MHP patrolmen led by Inspector Jones, "one or more of them responded with gunfire". 502 F.2d at 1268-69. The Court described this gunfire as hitting the "side" of Stewart Hall—in fact it smashed through a window into a dormitory room. (PX 160-PX163) But that time, fortunately, no one was hit. 502 F.2d at 1267-69.

*The MHP patrolmen's shotguns had been loaded with 00 buckshot and the JPD policemen's with number 1 buckshot. Shells of that size contain nine pellets, each approximately the diameter of a .30 caliber bullet. 502 F.2d at 1269. In contrast, the Mississippi

carbines, two submachine guns and a .308 rifle. *Id.* at 1269. During the 29 seconds of firing, the officers "discharged from 121 to 153 rounds of ammunition containing between 793 and 1,001 separate projectiles". *Id.* at 1270.

The impropriety of that barrage of gunfire was immediately established by the instant reaction of the commanding officer, Lt. Magee, who, as the Court found, "repeatedly called for the men to cease fire". *Id.*

Despite his immediate effort to regain control, and despite the repetition of his futile orders by three other officers, *id.*, the patrolmen persisted until they had shot up the entire front of the West Wing from the top (where the supposed sniper was located) to the ground, as well as shooting at the dispersing crowd of students, the rest of the dormitory and even across the street. 502 F. 2d at 1270-71.

b. As the Court also found, the expert testimony—including that of experts employed by the MHP and JPD—established that the firing was contrary to "universally accepted" law enforcement standards. Wesley Pomeroy, a career law enforcement officer and an expert in control of civil disturbances who had previously advised the JPD, testified for plaintiffs. As the Court recited, he testified "without contradiction" that

> "according to standards generally accepted* by law enforcement agencies throughout the United States, firepower of the kind used at Jackston State was never an appropriate response to sniper fire, par-

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National Guard, who were in reserve and whose procedures reflected greater attention to the risk of injury to third persons, had been instructed to carry unloaded shotguns and "on command" they were to load first with number 9 birdshot so as to minimize injuries. *Id.* at 1272. (Tr. 2599)

*In his testimony Pomeroy re-emphasized these words by adding "universally accepted". *Id.* at 1273.

ticularly when there are large numbers of people in the vicinity." *Id.* at 1273.

Pomeroy's expert testmony on the standard of care was confirmed by (i) testimony of the chief training officers of both police departments involved, (Tr. 975-77; 2824) (ii) testimony of the commanding general of the Mississippi National Guard, 502 F.2d at 1272, and (iii) United States Army training procedures. (Tr. 930-45; GX 3) Illustrations follow:

(1) *MHP Training.* Chief training officer William M. Jones testified:

> "Q. Now, Officer Jones, does any part of the training include training for a situation where someone may be firing at the officers but there are people not firing at the officers in the line of fire the officers would have to use were they to return the fire of the person firing at them?
>
> "A. Do we teach that they return fire into the sniper that is firing at them with people around the sniper? Is that your question?
>
> "[Q.] Yes.
>
> "A. No, we don't teach that. You do not shoot innocent people because someone is shooting at you. You do not want to take an innocent life. The method that you would use would be left up to the person in charge—to disburse [*sic*] and maybe some way get the sniper out of there without firing into a mass of people. This would be left again, up to the person in charge." (Tr. 976-77)

(2) *JPD Training.* Chief training officer C. R. Wilson testified:

> "[W]e instructed our officers not to fire unless they're given a command to fire and then only fire when the commander of the task force tells them.

"Q. Even if a sniper was firing at them?

"A. Right." (Tr. 2824)

* * *

"Q. And why is it important to have control over the men and complete charge over the fire power that's laid down?

"A. Because when you open up on a group of people, a lot of innocent people become involved in fire power." (Tr. 2827)

(3) *Mississippi National Guard Training.* Commanding General Walter Johnson's testimony, which was quoted by the Court of Appeals, makes precisely the same point:

"'Q. Under what circumstances would an order be given to return fire? [Except for small patrols, the Guard permits return fire only upon the command of an officer to load and fire.]

"'A. If we actually took fire—in other words a ricochet by your foot or something like that—now we are not going to fire into a crowd because we've picked up one. But if we can isolate this man we will first try to capture him, but if he can't be captured he will be [k]illed. We have specially trained sniper teams with sniperscopes, infra-red night firing sniperscopes. We have heav[y] lights. Very often, as has been reported, say, in Watts, you will get a lot of sniper fire from tops of buildings or from the dark, and we will try to search out and put a stop to that.

"'Q. If your men were in front of a darkened building and sniper fire started coming from a

window, what would their response be according to your standard operating procedure?

"'A. Probably give the order to take cover and disperse immediately. No point in just standing there. We would take cover and protect ourselves and the special sniper teams would attempt to search out, seize or destroy.'" 502 F.2d at 1272.

As the Court further noted, the two sergeants of the JPD "who were trained, equipped and designated to deal with snipers never fired". *Id.* at 1273.

c. Even if—contrary to the preceding findings which demonstrate the illegality of the officers firing at all—some firing might have been excused, the firing which killed or wounded petitioners or their decedents was unlawful because it was "beyond the physical limits of justifiable response". Here again, the testimony of the officers themselves and their own training officers established that there was absolutely no excuse or justification for shooting at the persons on the ground or other areas away from the supposed sniper:

First, the failure of a single officer to seek to justify such shooting bespeaks their knowledge that no justification was possible.

Second, the impropriety of the shootings at issue was conclusively established by the uncontradicted and unchallenged expert testimony of the Mississippi Highway Safety Patrol's chief training officer. He was shown PX-133 (reproduced *supra* at p. 5 and in the Court's opinion at 502 F.2d at 1267) and asked to assume that the MHP officers in the street were fired on by a sniper in the second window from the top (the window circled). (Tr. 1036-48) Based on that assump-

tion, he testified that he could "not explain" (Tr. 1040) the damage shown on PX-133 outside lines A-A and B-B because if the MHP officers had fired according to their training in response to such a sniper (assuming, contrary to fact, that the MHP training or "generally accepted" standards, or the repeated orders to cease fire, permitted any firing at all under the circumstances) all shotgun shot would have struck the building between those lines. He further explained that the only damage which could properly have resulted from rifle or pistol fire would have occurred between lines C-C and D-D. (Tr. 1042-48)

Four of the five petitioners or their decedents—all except Mrs. Whitehead, who was inside the dormitory—were way outside those "physical limits" of justifiable response established by the MHP expert. Thus, even under the theories of the Court of Appeals, the shooting which resulted in the killing and wounding of those four could not have been part of any "justifiable response".

5. *Despite the official wrongdoing established by its findings, the Court nevertheless denied petitioners any relief.* The undisputed facts of record lead inexorably to a conclusion of liability as a matter of law. Yet the Court of Appeals held no one could be held responsible for the shootings because it speculated that a jury might have found that some of the officers did not fire unlawfully or did not hit petitioners or their decedents. It even denied relief against those officers it held were "guilty of tortious conduct as a matter of law".

In order to reach this anomalous result, the Court ignored the constitutional and legal principles of a free society, which restrain official misconduct, relied upon tortured

and erroneous analysis of arcane tort law, and failed to apply its own findings of fact:

First, the Court was impressed by the fact that a jury verdict had been returned for each of the defendants. *But,* the undisputed facts, as found by the Court itself, demonstrate that the shootings of petitioners and their decedents were unlawful as a matter of law and should never have been submitted to a jury. Moreover, the instructions to the jury were improper, although the Court took the unexplained position that it was "unnecessary" to deal with all the charges (including the charge under which the jury was permitted to return a general verdict for the defendants if they found plaintiffs assumed the risk of being shot as a result of an excessive cumulated use of deadly force). *Id.* at 1286.

Second, in so far as the individual officers were concerned, the Court held that each individual must be free from liability because "harm may have resulted from sources other than those acting tortiously". 502 F.2d at 1283.

But, to reach that conclusion, the Court forgot its own findings, speculated that a jury might have found "justifications" that the defendants had specifically and repeatedly renounced, and created rules of law which—for all the Court's own condemnations of the shootings as "excessive" and "beyond the physical limits of justifiable response"—provide a license for future use of excessive deadly force.

Given the places where petitioners or their decedents were killed or wounded, there is simply no way to conclude that "harm may have resulted from sources other than those acting tortiously". No one ever admitted or

attempted to justify shooting at those places and, under the Court's own findings, no one—court, jury or defendants—could do so.

Thus, the Court's hypothesis that a jury could have found that some of the officers may have shot lawfully is an abstract irrelevancy. It is irrelevant to the necessary conclusion that petitioners or their decedents were in fact shot unlawfully. Moreover, the hypothesis itself stems from the dangerous creation of a new theory of "self defense" in a constitutional case and at the same time an abandonment of traditional limitations upon that defense, as well as creation of a new and dangerous law of "riot" which even defendants and their counsel had repeatedly disclaimed. (*infra*, pp. 36-37)

Third, the Court held that the officers' employers, the City of Jackson and the State of Mississipi, were immune from suit. *But* the defense of immunity here is not consistent with our constitutional history which imposed the Fourteenth Amendment upon the states in order permanently to reverse the doctrine of state sovereignty over the right to life and liberty and to "assure redress", through "the power and majesty of American law". (*infra*, pp. 23-30)

Reasons for Granting the Writ

Summary

This Court should grant the writ because this case raises important constitutional and legal questions regarding the relationships between governments, government officials, citizens, and courts, which were wrongly decided below. Put bluntly and simply, the holding below is that if enough white officers act unlawfully and use such excessive deadly force that it is impossible to tell which officers fired which shots, their black victims have no redress for the unlawful

deaths and injuries they suffered. Unless corrected, the result below will shield from liability official lawlessness if it is committed on a big scale. Thus:

First, and most important, this case raises the question whether innocent bystanders injured and killed by police misconduct, which even the Court of Appeals below found in significant part to be tortious as a matter of law, are to be left without any remedy whatsoever.

Second, this Court should review the limitations that ancient immunity doctrines have placed on enforcement of the guarantees of the Fourteenth Amendment and the Civil Rights Acts, all of which were specifically enacted to prevent or redress the sort of tragedy which occurred here by protecting black people from official lawlessness.

Third, this Court should reject the unrealistic concepts of causation imposed by the Court of Appeals because they serve to deny recovery upon Constitutional and Civil Rights Act claims where the proof of specific causation has been rendered impossible by the magnitude of the lawful conduct complained of.

Fourth, the Court should reject the extension of concepts of self defense and suppression of riot to justify the widespread use of deadly force at the price of death and injury to innocent bystanders.

Fifth, this Court should hold erroneous the legal theory under which innocent persons at the site of a demonstration can, by their presence, be said to have "assumed the risk" of being wrongfully shot, and should also hold that a United States Court of Appeals cannot avoid responsibility for reviewing such a charge.*

*There were many other erroneous charges to the jury (*supra,* pp. 19-20; App. E), but the main point is that a proper interpretation of the Constitution and law requires judgment of liability to be entered and not a reversal for a new trial.

From ancient times law has been fashioned to do justice and thereby channel controversy into the courts and avoid retribution outside the law. Today, more than ever, this goal is a paramount need which reflects the conscience in our society and our law. No violation of right should be without remedy.

The Court should take this case to reemphasize that no governmental misconduct can be above the law, to correct a specific injustice, to clarify important constitutional and legal principles, and to do so in an increasingly common context where citizens need to know just what it is governments can do to them within the law, governments need to know what they cannot do, and people require assurance that courts will furnish remedies for the violation of their rights.

A. THERE MUST BE A REMEDY FOR CONSTITUTIONAL AND CIVIL WRONGS AND THAT REMEDY CANNOT BE DENIED BECAUSE A GREAT MANY PEOPLE ACT UNLAWFULLY TOGETHER.

Suppose that all the shooting had been done by a single officer. Clearly petitioners would then have been entitled to judgment as a matter of law. To shoot at an alleged sniper in an upper window and then to rake the ground far from that location—*i.e.,* to use deadly force on innocent bystanders like petitioners or their decedents, who were outside the "physical limits of [any] justifiable response" would be an open and shut case for liability.

Of course, the actual facts are far *more* compelling. The massive, undisciplined use of firepower by 69 officers, all acting contrary to their training as well as repeated cease fire orders, is far *more* serious and dangerous. Yet the effect of the Court's decision is to relieve everyone from liability because the wrongdoing was so massive.

The theory of "the worse the better" should not be left enshrined in American jurisprudence.

We proceed to discuss the many theories under which various classes of defendants should have been held liable. But as one deals with those substantive and procedural niceties, a simple principle of justice should remain paramount—not ignored as we believe it was by the Court of Appeals.

Petitioners and their decedents were wrongfully shot. For the wrong done to them a remedy must exist. As stated by the first Mr. Justice Marshall in another context:

> "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury* v. *Madison*, 5 U. S. (1 Cranch) 137, 163 (1803).

B. ENFORCEMENT OF THE FOURTEENTH AMENDMENT REQUIRES THAT THE STATE BE HELD LIABLE.

This is obviously a situation where the most just result is to hold the State (and the City) liable. As we show below, each of the individual officers is liable for their part in the excessive firing which resulted in the deaths and injuries at issue. But, whatever causation problems there are for individual defendants, it is clear that agents of the State (and City), acting on their behalf, used illegal official force to kill and wound petitioners or their decedents. In such circumstances all other kinds of major institutions in our society would be held liable under principles of respondeat superior and policy judgments favoring an equitable spreading of risks.

Does immunity insulate the State of Mississippi?

Dicta in opinions of this Court appear to support immunity. But no holding forecloses liability, and the Court has

expressly left open the question posed here. The cases which appear to the contrary are inapplicable and their circumstances and reasoning distinguishable. In any event, the arguments which we believe to be compelling here were not made in those cases. Most importantly, this nation's constitutional history compels rejection of immunity in this case.

1. The State's Defense of Sovereign Immunity Here Is Inconsistent with Our Constitutional History.

The states that seceded from the Union did so in the name of state sovereignty.* Their aim was to eliminate interference with their "sovereign" right to separately define the rights of their respective populations—including the "sovereign" power to deprive black slaves of any claim of right to liberty, as well as life and property.

The Civil War was fought and they lost. The victors then did more than simply restore the status quo. Through the War Amendments, particularly the Fourteenth Amendment, they fundamentally and permanently altered the relationship between the states and the national government through the higher law of the Constitution. In this, the second American Revolution, the states were expressly deprived of their prior absolute sovereignty in the very arena here involved. "No State", it was established, shall "deprive any person of life, liberty, or property, without due process of law".

Could it be that those striving to achieve a just national reunification, through change in the basic fabric of our

*The preamble to the Confederate Constitution "recited that each state acted 'in its sovereign and independent character, in order to form'—not a 'more perfect union' but 'a permanent federal government.' . . . The constitution was ordained, not by a consolidated people, but by 'the people of the Confederate States, each State acting in its sovereign and independent character.' " J. RANDALL & D. DONALD, THE CIVIL WAR AND RECONSTRUCTION 157-58 (2d ed. 1969).

system, would suppose a state could send its agents into the streets to shoot innocent bystanders, the descendents of the very people the Amendment was most concerned with, and then hide behind the pre-Civil War doctrine of state sovereignty? Surely in those circumstances one would expect that—absent some overwhelming reason to believe the framers of the Fourteenth Amendment had some reason to insulate the states—they did not do so.

In fact, the Reconstruction Congress found it proper and essential to override a far more significant attribute of state sovereignty than a claim of right to avoid being sued for a federal wrong in a federal court. After the Congress had proposed the Amendment, it initially failed of ratification by the requisite three-quarters of the states. Of the eleven former Confederate States only Tennessee initially ratified the Amendment. The other ten rejected it as an affront to states rights.* Congress promptly resolved in the

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*The Mississippi legislature had initially unanimously rejected the amendment as a "gross usurpation of the rights of the States", H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 203 (1965), citing ANNUAL CYCLOPAEDIA 521 (1866). After it had become part of the Constitution, however, Mississippi ratified it in order to be able to regain full participation in the Union. *Id.* at 191.

It is plain from the positions taken by those opposing the Amendment that it was viewed as a radical change in the original Constitution's acceptance of state sovereignty. Thus, Representative Rogers:

> "When sifted from top to bottom it will be found to be the embodiment of centralization and the disfranchisement [*sic*] of the States of those sacred and immutable State rights which were reserved to them by the consent of our fathers in our organic law." CONG. GLOBE, 39th Cong., 1st Sess. app. 133 (1866).

So Representative Hale:

> "It does seem to me that the tenor and effect of the amendment proposed here by this committee is to bring about a more radical change in the system of this Government, to institute a wider departure from the theory upon which our fathers formed it than ever before was proposed in any legislative or constitutional assembly." CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866).

act of March 2, 1867, that (i) none of the excluded states would be restored to full membership in the Union until the Amendment became part of the Constitution; and (ii) no particular state would regain its full rights until it individually ratified the Amendment. All complied.* J. RANDALL & D. DONALD, THE CIVIL WAR AND RECONSTRUCTION 633 (2d ed. 1969).

Thus, as a condition precedent to being again part of this nation, the secessionist states made a binding pact with the rest of the nation that they would honor and respect the higher law of the Union. Specifically, in as many words, they promised they would not "deprive any person of life, liberty or property, without due process of law". Petitioners and their decedents were certainly intended to be among the direct beneficiaries of that compact and promise. Just as this Court held in *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 443 (1968), that the "promise" of the Thirteenth Amendment could only be fulfilled by an effective remedy to ensure open housing for black people, here the promise of the Fourteenth Amendment can only be fulfilled by granting an effective remedy against the State which so flagrantly violated it.

2. Holding the State Is Not Immune from Fourteenth Amendment Claims of the Sort Made Here Is Not Inconsistent with Prior Decisions of this Court.

The very concept of sovereign immunity, rooted in the theory that the "king can do no wrong", has been recog-

*As we show in the next section, the Eleventh Amendment, and the cases extending its principle to suits by citizens against their own state, are based upon an understanding of state sovereignty held by the founding fathers and their immediate successors and incorporated by them in the original (pre-Civil War) Constitution. It was those theories which the Fourteenth Amendment rejected—as its opponents recognized before they ratified it.

nized as an anomaly in a republican form of government. *See, e.g.,* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity,* 77 HARV. L. REV. 1, 1-2 (1963).* Perceiving this, Mr. Justice Holmes sought to articulate for this Court another theory:

> "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa* v. *Polyblank,* 205 U. S. 349, 353 (1907).

That justification is simply inapplicable in this case. Here, the "authority that makes the law on which the right depends" is not the State of Mississippi, but a higher law—the United States Constitution—which was amended for the specific purpose of taking power away from the State.**

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*There has been substantial erosion of this concept of immunity by the actions of state courts in the twentieth century. *Evans* v. *Board of County Comm'rs,* 174 Colo. 97, 482 P. 2d 968 (1971); *Smith* v. *Idaho,* 93 Idaho 795, 473 P. 2d 937 (1970); *Holytz* v. *City of Milwaukee,* 17 Wis. 2d 26, 115 N. W. 2d 618 (1962). It is virtually extinct in so far as actions against the United States are concerned—both because of legislation (the Federal Tort Claims Act, ch. 753, tit. IV, 60 Stat. 842, passed in 1946, and the Tucker Act, ch. 359, 24 Stat. 505, passed in 1887) and because of judicial decisions. *See, e.g., Lord* v. *Kelley,* 223 F. Supp. 684 (D. Mass. 1963), *appeal dismissed,* 334 F. 2d 742 (1st Cir. 1964), *cert. denied,* 379 U. S. 961 (1965).

Indeed, claims of absolute immunity made by one branch of the national government against another have been recently rejected by this Court, again because such claims must yield to the command of the Constitution's higher authority. *United States* v. *Nixon,* 94 S. Ct. 3090, 3100 (1974); *Powell* v. *McCormick,* 395 U. S. 486, 548-49 (1969).

**Language in Mr. Justice Holmes' opinion appears to recognize the distinction:

> "It is true that Congress might intervene, just as in the case of a State the Constitution does, and the power that can alter the Constitution might. *But the rights that exist are not cre-*

While it is true that in *Hans* v. *Louisiana,* 134 U. S. 1 (1890), the Court held that Louisiana was immune from a suit brought by its own citizens, neither *Hans* nor the many subsequent decisions relying upon it should be read to support the claim of immunity asserted here. *Hans* involved a claim under the pre-Civil War Constitution and its reasoning depends entirely upon analysis of what the founding fathers thought they were creating in the "organic law" (*supra,* p. 25 n.), which the Fourteenth Amendment altered.

The *Hans* Court reasoned that the original framers had expected the states to be immune from suit because they relied upon " 'the conscience of the sovereign' " states, *id.* at 13, and concluded that:

> "to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause." *Id.* at 21.

By ratifying the Fourteenth Amendment, however, the states explicitly surrendered the right to decide what their "honor and safety" might require in the area of civil rights. And the compulsion of the Constitution replaced conscience.

After *Hans,* this Court, without mention of the foregoing points and, we believe, without the points ever being argued by a party, has relied upon *Hans* (or the Eleventh

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ated by Congress or *the Constitution,* except to the extent of certain limitations of power." 205 U. S. at 353-54. (Emphasis added)

Similarly, in *Great N. Life Ins. Co.* v. *Read,* 322 U. S. 47 (1944), this Court, in finding Eleventh Amendment immunity for Oklahoma under the circumstances of that case, stressed that a sovereign should be "free from judicial compulsion in the carrying out of its policies *within the limits of the Constitution.*" *Id.* at 51. (Emphasis added)

Amendment) in cases arising under the civil rights statutes. However, in 1908 the Court expressly left open whether the Fourteenth Amendment "altered or limited the effect" of the Eleventh Amendment. *Ex parte Young,* 209 U. S. 123, 150 (1908). And, as noted last term in Mr. Justice Marshall's dissent in *Edelman* v. *Jordan,* 415 U. S. 651, 694 n. 2 (1974), the Court has

> "not decide[d] whether the States' Eleventh Amendment sovereign immunity [nor any sovereign immunity read into the original Constitution by *Hans*] may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment".

Nor does *Edelman* or any other case stand for the proposition that there can be a constitutional right without a remedy. There, this Court upheld injunctive relief ordering future expenditure of state funds. An *Edelman*-type suit can be commenced as soon as a Fourteenth Amendment wrong is committed, so injunctive relief could be a complete remedy. Here, of course, injunctive relief was not—and could not have been—an available remedy at any time. Similarly, *Hans* stressed the availability of other remedies. 134 U. S. at 21.

The aim of the Fourteenth Amendment was to establish for all the states, South and North, a constitutional rule which would place rights to life and liberty beyond any contrary claim of state sovereignty and would guarantee redress through law for wrongs committed by a state against those rights. As Congressman Bingham, a member of the Committee of 15 and the author of the part of the Amendment at issue here, stated during debate over a bill concerning recognition of the then existing governments of

ten southern states, the Fourteenth Amendment was designed to ensure that:

> "[W]hen either Ohio or South Carolina or any other State shall in its madness or its folly refuse to the gentleman or his children or to me or to mine any of the rights which pertain to American citizenship or to a common humanity, *there will be redress for the wrong through the power and majesty of American law.*" CONG. GLOBE, 40th Cong., 2d Sess. 514-15 (1868). (Emphasis added)

As we show next, a damage award is in this case the normal and necessary remedy by which to obtain "redress for the wrong through the power and majesty of American law".

3. Mississippi Is Liable for Depriving Its Citizens of Life and Liberty Without Due Process of Law.

As this Court held in *Bivens* v. *Six Unknown Named Agents*, 403 U. S. 388 (1971), citing *Bell* v. *Hood*, 327 U. S. 678 (1946):

> "'[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.'" 403 U. S. at 392.

Accordingly, *Bivens* held, as *Bell* had implied, that there was a federal claim for damages for violation of petitioners' Fourth Amendment rights. *See City of Kenosha* v. *Bruno*, 412 U. S. 507, 516 (1973) (Brennan, J., concurring); *Howell* v. *Cataldi*, 464 F.2d 272, 274-75 (3d Cir. 1972) (applying *Bivens* to claim against state officials which relied upon the Eighth Amendment as incorporated in Fourteenth Amendment).

Here, the state has invaded "federally protected rights"—rights created by the express limitations placed upon state conduct by the Fourteenth Amendment.* Thus, under *Bivens,* this is a proper constitutional claim of liability against the State of Mississippi, and the federal courts should "grant the necessary relief".

The Fourteenth Amendment's Due Process Clause has long been construed to protect citizens' rights to property from infringement by states or state agencies having a delegated power of eminent domain. *Chicago B. & Q. R.R.* v. *Chicago,* 166 U. S. 226, 233-41 (1897). And in *Jacobs* v. *United States,* 290 U. S. 13, 16 (1933), the Court held that the right to just compensation rested upon the Fifth Amendment and "[s]tatutory recognition was not necessary".

Why, particularly after *Bivens,* should citizens' rights to life and liberty be unprotected while their property rights are guaranteed?

Moreover, this Court has frequently recognized a right to recovery where none had previously existed when that right will assure "vindication of federal policies". *Moragne* v. *States Marine Lines, Inc.,* 398 U. S. 375, 401 (1970). Here, as in *Moragne,* the rule applied by the Court of Appeals to relieve the State of Mississippi (and City of Jackson) from liability is " 'barbarous' ", and here, as there, there is no "clear and compelling justification for what

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*District court jurisdiction over the Fourteenth Amendment claim is based upon both 28 U. S. C. §§ 1331 and 1343—as pleaded, the matter in controversy "arises under the Constitution" and was commenced to "redress the deprivation" of constitutional rights and exceeds the sum of $10,000.

Moreover, even if the Fourteenth Amendment were held not to constitute an exception to the jurisdictional limitations of *Hans* (or the Eleventh Amendment), the district court could take jurisdiction of a claim otherwise outside its original jurisdiction where that claim arises out of the same facts as a claim within its original jurisdiction. *United Mine Workers of America* v. *Gibbs,* 383 U. S. 715, 725 (1966); *see Rosado* v. *Wyman,* 397 U. S. 397, 402-05 (1970).

seems a striking departure from the result dictated by elementary principles in the law of remedies". *Id.* at 381. *See also Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 13 n. 9 (1971) (implying a federal right of action for damages for violation of SEC regulations under section 10(b) of the Securities Exchange Act); *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964) (the same for violation of SEC proxy rules); *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U. S. 210 (1944) (the same for violation of a union's statutory duty to represent workers without racial discrimination).

Again, there is no reason why petitioners' explicit federal constitutional rights to life and liberty should fare less well than implied federal rights established for commercial and labor matters by a federal statute or federal agency regulations.

Our constitutional commitment to protect the people against governmental misconduct has, since the Civil War, been progressively made more effective by action of this Court. Prior to the Civil War, in cases such as *Dred Scott* v. *Sandford*, 60 U. S. (19 How.) 393 (1857), and *Barron* v. *Baltimore*, 32 U. S. (7 Pet.) 243 (1833), the Court read the original Constitution as leaving the sovereign states alone in such matters. For many years following the Civil War (through and beyond the time the Court decided *Hans*), the Court construed the Fourteenth Amendment in ways that substantially limited its significance. More recently in areas ranging from civil rights,* to privacy,** to speech,†

**Compare Plessy* v. *Ferguson*, 163 U. S. 537 (1896), *with Brown* v. *Board of Educ.*, 347 U. S. 483 (1954).

***Compare Buck* v. *Bell*, 274 U. S. 200 (1927), *with Roe* v. *Wade*, 410 U. S. 113 (1973).

†*Compare Beauharnais* v. *Illinois*, 343 U. S. 250 (1952), *with New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).

to criminal procedural guarantees,* to the apportionment of election districts** the Court has overruled or distinguished away older cases in favor of finding remedies to check or redress governmental interference with citizens' rights.

The Constitution is a living document, to be interpreted according to Mr. Chief Justice Marshall's exhortation that "we must never forget that it is a *constitution* we are expounding". *McCulloch* v. *Maryland*, 17 U. S. (4 Wheat.) 316, 407 (1819). Here, as was the case in *Moragne*, constitutional law has "furnish[ed] a clear guide for the conduct of individuals [here states] . . . enabl[ing] them to plan their affairs with assurance against untoward surprise". 398 U. S. at 403. Thus here, as in *Moragne*, there should be a "remedial rule to effectuate well-established primary rules of behavior". *Id.* And here the only effective remedy is damages which are the "particular remedial mechanism normally available in the federal courts". *Bivens* v. *Six Unknown Agents*, 403 U. S. 388, 397 (1971).

C. THE CITY OF JACKSON IS SIMILARLY LIABLE.

Neither the Eleventh Amendment nor *Hans* affects the liability of the City of Jackson, but, in *Monroe* v. *Pape*, 365 U. S. 167 (1961), this Court held 42 U. S. C. § 1983 did not cover actions against municipalities.† However, in *City of Kenosha* v. *Bruno*, 412 U. S. 507 (1973), where the majority applied *Monroe* to bar relief, it expressly noted the failure of the parties to brief the issue of alternative jurisdiction under 28 U. S. C. § 1331 and accordingly

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*Compare *Twining* v. *New Jersey*, 211 U. S. 78 (1908), *with Malloy* v. *Hogan*, 378 U. S. 1 (1964).

**Compare *Colegrove* v. *Green*, 328 U. S. 549 (1946), *with Baker* v. *Carr*, 369 U. S. 186 (1962).

†Subsequent analysis of the legislative history relied upon in *Monroe* might suggest reexamination of that decision. Note, *Developing Governmental Liability Under 42 U. S. C. § 1983*, 55 MINN. L. REV. 1201, 1205-07 (1971).

withheld decision on that question. 412 U. S. at 514. As noted in Mr. Justice Brennan's concurring opinion:

> "I find unimpeachably correct the District Court's conclusion that appellants failed to comply with the requirements of the Due Process Clause in denying renewal of appellees' liquor licenses. Nevertheless, since the defendants named in the complaints were the municipalities of Kenosha and Racine, jurisdiction cannot be based on 28 U. S. C. § 1343. . . . Appellees did assert 28 U. S. C. § 1331 as an alternative ground of jurisdiction, but I agree that the Court's conclusion that existence of the requisite amount in controversy is not, on this record, clearly established. If appellees can prove their allegation that at least $10,000 is in controversy, then § 1331 jurisdiction is available, *Bell* v. *Hood . . .; cf. Bivens* v. *Six Fed. Narcotics Agents . . .*, and they are clearly entitled to relief." *Id.* at 516.

Subsequently, lower courts have recognized such a claim if, as here, the Constitution and § 1331 have been asserted. *Waltenberg* v. *New York City Dep't of Correction*, 376 F. Supp. 41, 43-44 (S.D.N.Y. 1974); *Manos* v. *City of Green Bay*, 372 F. Supp. 40, 45 (E. D. Wis. 1974).

D. INDIVIDUAL OFFICERS SHOULD NOT BE ABLE TO ESCAPE LIABILITY WHEN EACH ONE SHOT AS PART OF A "CONFUSED MASS REACTION" IN VIOLATION OF ORDERS, HIS OWN TRAINING AND CONTRARY TO UNIVERSALLY ACCEPTED LAW ENFORCEMENT STANDARDS, AND CONTRIBUTED TO THE "EXCESSIVE CUMULATED USE OF DEADLY FORCE".

1. The Court of Appeals Overlooked Its Findings as to Where Petitioners Were Shot.

The Court of Appeals' fundamental error was in holding that the jury might conclude that "harm may have re-

sulted from sources other than those acting tortiously". 502 F.2d at 1283. As established above (*supra*, pp. 3-5, 10-14), at least four of the five petitioners or their decedents could not have been injured by any officer firing within the "physical limits of [any] justifiable response".

2. The "Excessive" Wrongful Firing Was a Common Enterprise in Which Each Participant Is Liable Regardless of Where or Whom His Firing Struck.

Having failed to recognize that at least the students on the ground were killed or injured only as a result of the wrongful gunfire of the officers, the Court of Appeals further erred in failing to apply the principle that all who act in concert in the commission of a wrong are equally liable for the results of the wrongdoing, regardless of which individual wrongdoer may have caused the injury. *See* W. PROSSER, LAW OF TORTS, § 41, at 243 (4th ed. 1971).

Wherever he shot, each and every officer who shot did so wrongfully. Whether a particular officer did hit petitioners or not, each one by shooting contributed to the excessive "confused mass reaction" which led to the deaths and injuries at issue. All are liable under established principles of Mississippi law. *See Moore* v. *Foster*, 182 Miss. 15, 180 So. 73 (1938); *Oliver* v. *Miles*, 144 Miss. 852, 110 So. 666 (1926).

But beyond those principles of Mississippi law, petitioners sued for violation of the federal law which is "read against the background of tort liability that makes a man responsible for the natural consequences of his actions", *Monroe* v. *Pape*, 365 U. S. 167, 187 (1961), as measured by "the prevailing view in this country". *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967). We submit that it is not, nor can it be, the prevailing view in this country that the defendants can escape liability for the excessive and unlawful actions in

this case, simply because the magnitude of the barrage made it impossible to show whose shots hit whom.*

3. The Court's Comments about "Self Defense" and "Riot" Were Irrelevant and, in Any Event, Inconsistent with the Limitations Free Societies Place on the Official Use of Deadly Force.

The only "justification" offered by any defendant for his firing was "self defense", but that defense was refuted by the locations where the dead and wounded were found. (*supra*, pp. 3-6; 17-18) In addition, the uncontradicted testimony of all law enforcement experts established that, considering the danger to hundreds of innocent bystanders, even firing at the supposed sniper was a violation of universally accepted police standards, the officers' own training, and standards defined that night by officers in charge who immediately and repeatedly ordered a cease fire. Nevertheless, the Court of Appeals held that each defendant's rote claim of self defense was sufficient to present a jury question as to his "justification".

That holding, accordingly, means that no police officer need heed his own training, nationally recognized procedures, or the safety of hundreds of innocent bystanders before eschewing non-lethal alternatives in favor of deadly force.**

There is no basis in the record to support the suppression of riot instruction given by the District Court.

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*The Court of Appeals noted, but did not resolve, the anomaly of measuring the overall responsibility of the group by the actions of the individual officers. 502 F.2d at 1272. A correct way to resolve this anomaly, we submit, is to hold the State of Mississippi and City of Jackson liable for the collective excessive actions of their agents (as well as holding the officers liable). In no event is the answer to relieve everyone from liability.

**In addition, that holding abandons the duty each officer had to seek cover or withdraw behind the readily available massive cover of Thompson's Tank which was stopped in the midst of the contingent. (PX 184, Tr. 2794)

Not one of the officers who fired claimed to have done so to suppress a riot [a necessary element of the defense under RESTATEMENT (SECOND) OF TORTS § 142, comment b at 255 (1965)], because as defense counsel conceded on appeal they were not permitted to fire to suppress a riot without a command. (City Br. on Appeal at 3; State Br. on Appeal at 24) There was no command. Thus, defense counsel repeatedly conceded at the trial that the defense did not apply. (Tr. 66, 2975)

Apart from those concessions, the use of medieval concepts of suppression of riot to justify the use of deadly force upon petitioners and their decedents is abhorrent in a free society. The crowd was dispersing—thus the commanding officer did not believe even tear gas was appropriate. Even assuming—contrary to all the points about training, etc., which rebut the self defense excuse—shooting at a sniper could be characterized as "meeting a riot situation", 502 F. 2d at 1281, any such shooting must fall within the "physical limits of [any] justifiable response", and it plainly did not.

E. UNDER A CONSTITUTIONAL SYSTEM, INNOCENT BYSTANDERS DO NOT "ASSUME THE RISK" OF BEING SHOT BY THE POLICE.

The trial court, through its instructions, permitted the jury to find that the petitioners and their decedents assumed the risk of being shot. (Tr. 3231-32) Despite the fact that nothing in the record provides a basis for such a finding, the Court of Appeals failed to reach the District Court's instructions on assumption of risk because it believed that "its other conclusions make it unnecessary". 502 F. 2d at 1286.

But the entire basis of the Court of Appeals decision is that it must give virtually conclusive weight to a jury decision. That jury decision here was a general verdict which could have been based entirely on this erroneous

instruction., *Williams* v. *North Carolina,* 317 U. S. 287, 291-92 (1942). Consequently, the Court of Appeals cannot both put into the hands of the jurors all the decision-making responsibility in this case and refuse to examine all the instructions meant to govern the discharge of that responsibility.

The rule of "law" assumed in giving the instruction is abhorrent. Maybe in a totalitarian society the risk of being shot at and killed by the police is assumed in circumstances such as these, but not here.

The persons shot can hardly have been held to have assumed the risk that a sniper might fire on the officers and that the officers would wrongfully respond by laying down an "excessive" barrage far "beyond the physical limits of [any] justifiable response".

If assumption of risk could be found on these facts, it must therefore be the law that every woman in Alexander Hall (which houses 965 people) (Tr. 1790) should have evacuated the building by the rear exits at midnight on May 14-15, 1970. It also means that JPD Lt. Magee, by commanding students to clear the street (instead of telling them, for example, to leave the city), seriously misled the students, to their detriment. But, of course, what it really means is that any black who ventures near a large group of white officers on duty is subject to being killed or wounded without any recourse.

Thus, the effect of allowing a jury to excuse the shootings on a theory of "assumption of risk" is to confirm one petitioner's conviction that white police officers believe that

> "if they kill a nigger ain't nothing going to be done in no way." (Tr. 301)

That is the effect of the assumption of risk instruction, and is the result of the proceedings below. Under the circumstances present here the result cannot be consistent with our Constitution and laws.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

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APPENDIX A

(Constitutional Provisions)

ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ELEVENTH AMENDMENT

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CIVIL RIGHTS ACT OF 1871

SECTION 1. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 [42 U.S.C. § 1983]

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

CIVIL RIGHTS ACT OF 1866

SECTION 3. Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27 [42 U.S.C. § 1988]

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

MISSISSIPPI WRONGFUL DEATH ACT

Miss. Code Ann. § 1453 (1942) [now Miss. Code Ann. § 11-7-13 (1972)]

Whenever the death of any person shall be caused by any real wrongful or negligent act or omission, or by such unsafe machinery, way or appliances as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, or whenever the death of any person shall be caused by the breach of any warranty, express or implied, of the purity or fitness of any foods, drugs, medicines, beverages, tobacco or any and all other articles or commodities intended for human consumption, as would, had the death not ensued, have entitled the person injured or made ill or damaged thereby, to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow or children or both, or husband or father or mother, or sister, or brother, the person or corporation, or both that would have been liable if death had not ensued, and the representatives of such person shall be liable for damages, notwithstanding the death, and the fact that death was instantaneous shall in no case affect the right of recovery. The action for such damages may be brought in the name of the personal representative of the deceased person for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one suit for the same death which shall ensue for the benefit of all parties con-

cerned, but the determination of such suit shall not bar another action unless it be decided on its merits. In such action the party or parties suing shall recover such damages as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit.

This section shall apply to all personal injuries of servants and employees received in the service or business of the master or employer, where such injuries result in death, and to all deaths caused by breach of warranty, either express or implied, of the purity and fitness of foods, drugs, medicines, beverages, tobacco or other articles or commodities intended for human consumption. Damages recovered under the provisions of this section shall not be subject to the payment of the debts or liabilities of the deceased, except as hereinafter provided, and such damages shall be distributed as follows:

Damages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children all shall go to his wife; damages for the injury and death of a married woman shall be equally distributed to the husband and children, and if she has no children all shall go to the husband; and if the deceased has no husband or wife, the damages shall be equally distributed to the children; if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters, or such of them as the deceased may have living at his or her death. If the deceased have neither husband, or wife, or children, or father, or mother, or sister, or brother, then the damages shall go to the legal representative, subject to debts and general distribution, and the fact that the deceased was instantly killed shall not affect the right of the legal representative to recover. The provisions of this section shall

apply to illegitimate children on account of the death of the mother and to the mother on account of the death of an illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates.

If the deceased be illegitimate and shall leave neither mother, child nor lawful heirs, then all the provisions of this Section shall extend and apply to the legal representatives, and the other natural blood relatives of the deceased the same as if they were his legitimate relatives and heirs, excepting his father and his father's relatives, unless they be full brothers or sisters of deceased, or their heirs.

Any rights which a blood parent or parents may have under this Act are hereby conferred upon and vested in an adopting parent or adopting parents surviving their deceased adopted child, just as if the child were theirs by the full blood and had been born to the adopting parents in lawful wedlock.

FEDERAL QUESTION JURISDICTION

Act of July 25, 1958, Pub. L. No. 85-554, § 1, 72 Stat. 415 [28 U.S.C. § 1331]

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

CIVIL RIGHTS JURISDICTION

Act of September 9, 1957, Pub. L. No. 85-315, § 121, 71 Stat. 637 [28 U.S.C. § 1343]

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

APPENDIX C

(Opinion Below)

***Burton v. Waller*, 502 F. 2d 1261 (5th Cir. 1974)**

Myrtle Green BURTON, Individually and in her Capacity as Representative of James Earl Green, Deceased, et al., Plaintiffs-Appellants,

v.

William L. WALLER, Individually and as Governor of the State of Mississippi, et al., Defendants-Appellees.

No. 72-2311.

United States Court of Appeals,
Fifth Circuit.
Oct. 18, 1974.

Damages were sought for deaths and injuries from gunfire laid down by a detachment of officers who were on a state college campus as a result of student disorders. Defendants prevailed in the United States District Court for the Southern District of Mississippi at Jackson, Walter L. Nixon, Jr., J., after jury trial, and the plaintiffs appealed. The Court of Appeals, Godbold, Circuit Judge, held that the state and city enjoyed sovereign immunity under the law of Mississippi. Evidence made a question of fact for the jury whether particular officers acted reasonably under the privilege of self-defense or privilege relating to riot, and that even if one or more of seven particular officers failed to bring themselves within such a privilege, the state of the evidence respecting causation raised a jury question precluding directed verdict of liability. Alleged failures of supervisory officers on the scene to perform various functions raised jury questions and could not be the basis for directed verdicts for plaintiffs.

Affirmed.

1. Courts ⇐263(2)

Where state and federal claims arose from same nucleus of operative facts, federal court had jurisdiction over state claim.

2. Courts ⇐303(1)

By virtue of the Eleventh Amendment, state was immune from suit brought under 1871 Civil Rights Act. 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 11.

3. Municipal Corporations ⇐747(3)

Under Mississippi law, city was immune from liability for torts of its police officers.

4. Civil Rights ⇐13.8(3)

City was immune from suits brought under 1871 Civil Rights Act. 42 U.S.C.A. § 1983.

5. Civil Rights ⇐13.10

Privilege of individual police officers to fire in self-defense or to quell riot was common-law defense which could be asserted in response to action under 1871 Civil Rights Act to same extent that it was relevant to pendent Mississippi law claim. 42 U.S.C.A. §§ 1983, 1988; Code 1942, § 2361.5–01, subd. A.

6. Civil Rights ⇐13.13(3)

Mississippi and general tort law requirements respecting proof of causation were applicable to claim against police officers in action under 1871 Civil Rights Act, arising out of deaths and injuries from gunfire laid down by officers who were on college campus as result of student disorders. 42 U.S.C.A. § 1983; Code 1942, §§ 11–7–13, 2361.5–01, subd. A.

7. Weapons ⇐18(1)

Mississippi imposes highest degree of care upon person handling firearms.

8. Assault and Battery ⇐13
Death ⇐21

Under general principles of tort law, one is entitled as matter of self-defense to employ deadly force to repel deadly force, and, under Mississippi law, retreat is not prerequisite to use of deadly force.

9. Riot ⇐9

Under general principles, one may use deadly force for purpose of suppressing riot or preventing other persons from participating in it, if riot is one which threatens death or serious bodily harm. Code 1942, § 2361.5–01, subd. A.

10. Riot ⇐9

Under Mississippi law, in order for one to have right to use deadly force to suppress riot or prevent another from participating in it, it is not necessary that avowed purpose of participants in assemblage be to accomplish death or serious bodily harm but that conduct of participants is such as to create probability or even possibility of such consequences. Code 1942, § 2361.5–01, subd. A.

11. Weapons ⇐18(2)

For defense of privilege to quell riot, absence of disorderly acts of persons in crowd at precise moment when plaintiffs were killed or injured by officers' gunfire was not determinative, and where prior to time firing began numerous officers had been struck by missiles, and some of them injured and some felled by bricks and sniper had fired, it was jury question whether riot was one which threatened death or serious bodily harm though, at precise time firing by officers began, crowd was beginning to disperse on orders and tear gas was believed unnecessary. Code 1942, § 2361.5–01, subd. A.

12. Federal Civil Procedure ⇐1971, 1973

In action arising out of deaths and injuries from officers' firing of guns on occasion of student disorders on college campus, privilege of employing deadly force to subdue riot was not made inapplicable by defense counsel's opening statement and argument that his clients did not rely upon justification of quelling riot or by fact that no officer in question characterized his firing in riot-suppression terms. Code 1942, § 2361.5–01, subd. A.

13. Assault and Battery ⇐13
Death ⇐21
Riot ⇐9

Under Mississippi law, privilege to use deadly force in self-defense or to suppress riot is not unrestrained but is

subject to limitations of scope and of manner of exercise. Code 1942, § 2361.-5–01, subd. A.

14. Assault and Battery ⇐13

Under Mississippi law, when self-defense is claimed, actor is not privileged to use any means intended or likely to cause bodily harm in excess of that which he correctly or reasonably believes to be necessary for his protection; actor must consider whether lesser force will prevent apprehended harm.

15. Assault and Battery ⇐13
Death ⇐21

Under Mississippi law, privilege to use deadly force in self-defense does not entitle privileged person to strike without regard to risk of harm to third persons.

16. Riot ⇐9

Under Mississippi law, actor privileged to use deadly force to quell riot may not use means intended or likely to cause bodily harm in excess of that which he correctly or reasonably believes to be necessary to quell riot or to dissuade others from participating. Code 1942, § 2361.5–01, subd. A.

17. Riot ⇐9

Under Mississippi law one having privilege to use force to quell riot but exceeding scope of conduct allowed by it is liable for so much of force exerted by him as is excessive, and when it is not possible to separate harm caused by authorized force and that by excess, actor is liable for all the harm.

18. Municipal Corporations ⇐742(5)

Under Mississippi law, training of police officers in crowd control and related subjects, if it was to be given any weight in action for deaths and injuries from gunfire in student disorders, was no more than probative of correct standard of officers' care, and was not conclusive. Code 1942, § 2361.5–01, subd. A.

19. Municipal Corporations ⇐744

Privilege of police officers, under Mississippi law, to fire at sniper or to engage in defensive fire to cause him to stop firing, to stay down and remain in place was subject to limitation that officer engaging in such fire was liable if he realized or should have realized that his acts created unreasonable risk of harm to third persons. Code 1942, § 2361.5–01, subd. A.

20. Civil Rights ⇐13.14

In civil rights action arising out of deaths and injuries from gunfire laid down by detachment of officers who were on college campus as result of student disorders, evidence made question of fact for jury, as to some officers, whether they acted reasonably under privilege of self-defense or privilege to quell riot. 42 U.S.C.A. § 1983; Code 1942, § 2361.5–01, subd. A.

21. Civil Rights ⇐13.14

In civil rights action for deaths and injuries sustained from gunfire laid down by detachment of officers who were on college campus as result of student disorders, even if one or more of seven particular officers failed to bring themselves within privilege of self-defense or of quelling riot, state of evidence respecting causation raised jury question on causation. 42 U.S.C.A. § 1983; Code 1942, § 2361.5–01, subd. A.

22. Torts ⇐27

Under usual burden under Mississippi law, plaintiff must introduce evidence affording reasonable basis for concluding that it is more likely than not that conduct of defendant was substantial factor in bringing about harm suffered by plaintiff.

23. Negligence ⇐61(1)

Under law of Mississippi, no recovery can be had where there is no showing which of several possible causes, including some not involving negligence of party charged, produced injury.

24. Municipal Corporations ⇐744

Under Mississippi law, actions of law enforcement detachment, each member of which had individualized authority to act against sniper fire, were not consistent with concepts of joint enterprise liability.

25. Joint Adventures ⇐1.4, 1.8, 7

Under Mississippi law, joint enterprise theory of liability arises by analogy to law of partnership, usually by contract, express or implied, and under circumstances in which each participant has equal voice in conducting enterprise.

26. Joint Adventures ⇐8

Whether joint enterprise exists is question for jury.

27. Civil Rights ⇐13.14

In civil rights action arising out of death and injuries from gunfire laid down by detachment of state and city officers who were on college campus as result of student disorders, alleged failures of supervisory officers on scene to perform various functions raised jury questions of supervisory officers' liability for failure to exercise command functions. 42 U.S.C.A. § 1983; Code 1972, § 45–3–21; Code 1942, § 2361.5–01, subd. A.

28. Civil Rights ⇐13.7, 13.14

Commissioner, responsible for regulations and training of state highway patrolmen, was not subject to absolute liability if procedures or training for riot control proved to be deficient but only for due care in performance of his duties, and due care was jury issue in civil rights action brought by persons injured by patrolmen during civil disorder. 42 U.S.C.A. § 1983; Code 1972, § 45–3–21.

29. Riot ⇐9

Individual officer defendants who had prepared lesson plans for riot training of state patrolmen, submitted plans to official for approval and then conducted training pursuant thereto were not liable as a matter of law for alleged failure to perform functions, allegedly resulting in deaths and injuries during student disorders. 42 U.S.C.A. § 1983; Code 1972, § 45–3–21; Code 1942, § 2361.5–01, subd. A.

30. Weapons ⇐18(2)

Under Mississippi law, officers who fired during student disorders did not have burden of proving freedom from fault; plaintiffs had burden of proving by preponderance of evidence that some or all of defendants fired their weapons wrongfully or negligently. Code 1942, § 2361.5–01, subd. A.

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Robert E. Hauberg, U. S. Atty., Joseph E. Brown, Jr., Asst. U. S. Atty., Jackson, Miss. for F.B.I.

Roger Googe, Jr., Sp. Asst. Atty. Gen., Jackson, Miss., for defendants-appellees.

Before JONES, GODBOLD and INGRAHAM, Circuit Judges.

GODBOLD, Circuit Judge:

This is a civil suit seeking recovery of damages for the deaths of two black persons and injuries to three others from gunshot wounds suffered on the campus on Jackson State College in Jackson, Mississippi, on the night of May 15, 1970. These five persons, plus at least nine other blacks who were wounded but are not parties to the suit, were struck by gunfire laid down by a detachment of officers who were on the campus as a result of student disorders.

[1] The law enforcement detachment from which the gunfire came consisted of 69 persons, from the Mississippi Highway Safety Patrol (MHP) and the

Jackson Police Department (JPD). Suit was brought against all members of the detachment, the State of Mississippi, the City of Jackson, and numerous other persons not present at the scene but having official connections with the state, the city, MHP and JPD.[1] At trial a number of defendants who were members of the detachment, all of them non-supervisory personnel, testified that they did not fire their weapons, and prior to submission of the case to the jury they were dropped as defendants for want of proof. The composition of the detachment was as *follows:*

—Forty-three persons from the MHP. Of these, 38 (35 patrolmen and three supervisory officers) admitted firing their weapons and remained in the case as defendants. Also remaining as a defendant was MHP Inspector Lloyd Jones, who was the highest ranking MHP officer present but who did not fire. The remaining patrolmen testified they did not fire and were dropped as defendants.

—Twenty-six persons from the JPD. Five admitted firing and remained as defendants. Also remaining as a defendant was JPD Lieutenant Warren Magee, who was present and in command of the entire detachment but did not fire. Other JPD officers present testified they did not fire and were dropped as defendants.

Also remaining in the case as submitted to the jury were the State of Mississippi, the City of Jackson, and Commissioner Crisler.[2]

In the three-week jury trial the plaintiffs offered, in addition to their own testimony, that of numerous Jackson State students, several FBI representatives, officers in charge of training for the JPD, the MHP and the Mississippi National Guard, and an outside expert on police procedures for crowd control. Plaintiffs called as adverse witnesses all individual officers and supervisory officers present at the scene and Commissioner Crisler. Almost all of the testimony regarding the conduct of each individual officer at the time of the shooting, and all of the testimony as to who did and who did not join in the firing, *came from each officer himself* as an adverse witness. Thus all non-supervisory officers who remained in the case as defendants did so on the basis of each's admission from the witness stand that he fired. All officers who denied firing were dropped as defendants on the basis of their own testimony (except non-firing supervisory officers who were claimed to have failed to discharge supervisory duties).

At the close of the evidence plaintiffs moved for directed verdicts on the issue of liability, and the trial judge reserved decision. The jury returned a general verdict for all defendants. The District Judge then denied the directed verdict motions and motions for judgment n/o/v. In his accompanying bench opinion he stated that he considered the city and state to be immune from suit.

We have untangled as painstakingly as we are able the complex web of legal and factual issues. Having done so, we find no reversible error in the trial judge's rulings of law or in his submis-

1. The suit was brought under 42 U.S.C. § 1983, the Mississippi Wrongful Death Act, Miss.Code Ann. § 1453 (Now Miss.Code 1972 Ann. § 11-7-13), and the Mississippi common law. Federal jurisdiction is conferred by the § 1983 claim. The federal court has jurisdiction over the state claim because it and the federal claim arise from the same nucleus of operative facts. Anderson v. Nosser, 438 F.2d 183, 188-189 (CA 5, 1971), modified on rehearing on other grounds, 456 F.2d 835 (CA 5, 1972) (en banc).

2. Among those defendants not present at the scene but having some connection with the city or state at the time of the shooting, and dropped from the case by plaintiffs, were John Bell Williams, Governor of Mississippi; Russell Davis, Mayor of Jackson; James D. Gardner, Chief of the MHP; M. B. Pierce, Assistant Chief of the JPD; Woods Stringer, Chief Inspector of the Northern District of MHP.

sion of the isues to the jury, and we affirm.

Our inquiry into the facts and the law will follow this pattern:

A. The facts.

B. The effect of the gunfire.

C. Immunity from suit of the state and the city.

D. Sources of liability.

E. Liability of officers who fired.

F. Liability of individuals on other grounds.

G. Jury charges—and some loose ends.

H. Conclusion.

A. THE FACTS.

Because plaintiffs claim that the court erred in denying their motions for directed verdicts and judgments n/o/v, the facts must be set out in detail, with all reasonable inferences in favor of defendants.

1. The physical layout.

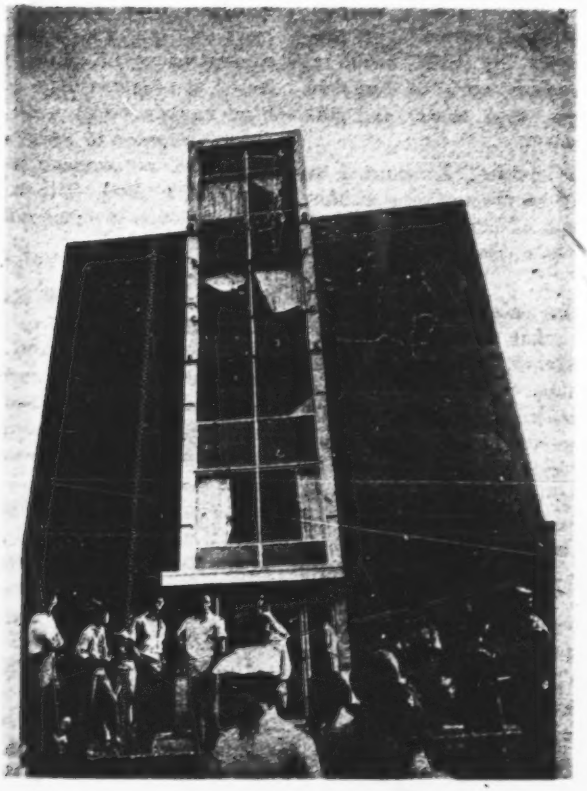
Jackson State College is a virtually all black four-year college with approximately 4,300 students, located in Jackson, Mississippi. The campus is bisected along its east-west line by Lynch Street, a major thoroughfare. Alexander Hall, the women's dormitory at which the shootings in issue occurred, is on the north side of Lynch Street. Most of it is pictured in the photograph PX 45.

Almost directly across from it and on the south side of Lynch Street is Roberts Dining Hall.

Alexander Hall houses between 900 and 1,000 female students. The front wings extend toward Lynch Street, and the center section, which consists generally of a first floor lobby area and dormitory rooms on the upper four floors, runs parallel to Lynch Street. The front wings, the sidewalk and the center section form a grassy courtyard. A four-foot chain link fence separates the

sidewalk on Lynch Street from the courtyard.

PX 133 shows the west wing of Alexander Hall as seen from Lynch Street.



The wing is 48'2" high. The central column, enclosing a stairway, is made up of five metal panels, each coinciding with a floor of the dormitory. Each panel contains a window composed of two large panes and located at the landing between floors. There are two glass doors at the ground level of the stairwell.

2. The night of May 13.

On the evening of May 13, 1970, students of Jackson State began throwing bricks, rocks, and other objects at cars passing through the campus on Lynch Street. Windows and headlights were broken on some cars, and a traffic light was broken out with rocks. In response Jackson police barricaded Lynch Street at both ends of the campus. Students set fire to two garbage carts used to haul trash from campus facilities, and they also made an attempt to burn the Army ROTC building. A contingent from the JPD assisted by members of the MHP—62 men and seven supervisory officers altogether—entered the campus to secure the ROTC building. The entire detachment was under the command of Lt. Magee of the JPD, and the highest ranking MHP patrolman present was Inspector Jones.

This group was subjected to some rock throwing and verbal abuse, and at least one patrolman was hit by a rock. Several of the officers heard occasional reports from small caliber weapons. The police found in automobiles and on persons in the area at least one high caliber military rifle and several small

caliber sidearms. None of the officers felt that he had been fired upon, however, and none discharged a weapon. Ultimately they were successful in providing security for the ROTC building, and as the evening wore on the two trash cart fires died down and the crowds dispersed.

In a printed handbill distributed to the student body on the morning of May 14, the president of Jackson State described the events of the preceding night thusly:

> On Yesterday evening, May 13, we had another what has become [sic] the annual riots at Jackson State College. This latest riot was perpetuated by a faceless, mindless mob of students and non-students bent on doing violence and destruction to the college and doing bodily harm to our own counselling personnel as well as to unsuspecting passersby. Considerable damage was done to the college property, mainly in the form of glass breakage. Two trailers used to haul garbage from dormitories and the dining hall were burned. Also a very determined attempt was made to incinerate Barracks 1-A. . . .

3. The official preparations.

The Mayor of Jackson had been oriented by the college president and, fearing the inadequacy of the JPD, had on May 13 requested assistance from the Governor of Mississippi. The Governor issued a proclamation invoking full police power on behalf of the Department of Public Safety, see Miss.Code Ann. § 8082 (now Miss.Code 1972 Ann. § 45-3-21), and issued executive orders mobilizing units of the Mississippi National Guard and directing the MHP to provide needed assistance to the JPD upon request by the city. On the morning of May 14 General Walter Johnson of the Mississippi National Guard conducted a meeting at the National Guard Armory in Jackson to coordinate plans for coping with the disorders at the college. Lt. Magee represented the JPD at this meeting; the MHP did not send a representative. The plan ultimately formulated called for 1,000 guardsmen equipped with armored personnel carriers and tear gas to stand ready to be committed at Lt. Magee's request. Selected guardsmen had orders to carry high caliber rifles with sniper scopes, but most were to carry unloaded shotguns, and on command they were to load first with four rounds of number 9 birdshot so as to minimize injuries.

4. The night of May 14.

During the day of May 14 property damaged the preceding night was repaired, and classes and final examinations proceeded as usual. That night, however, the difficulties resumed. Lt. Magee testified that "People were being rocked as they came through this area in their vehicles; . . . people were being injured as they passed through, bricks and things coming through their cars. We had a large group of people in this area that were becoming unruly." As on the preceding night, the officers barricaded Lynch Street. Shortly thereafter a privately owned dump truck was set afire by students on Lynch Street in front of Stewart Hall, a men's dormitory on the western edge of the campus. Responding to this incident, the same force of policemen and patrolmen that had been there the preceding night entered the campus, again under the command of Lt. Magee of the JPD and with Inspector Jones as the highest ranking MHP patrolman present. The force deployed between the burning truck and a crowd of 200 to 300 persons. Lt. Magee used a bullhorn to persuade the crowd to move away from the truck, and a fire truck was brought in to extinguish the fire. Many objects were thrown at the officers, including bottles and pieces of concrete, and they were called a variety of obscenities.

Some of the officers heard small caliber weapons being fired, and Inspector Jones testified that the fire truck was fired at. A few MHP patrolmen led by Inspector Jones entered an alley beside Stewart Hall, a bottle was hurled at

them, and one or more of them responded with gunfire, inflicting no personal injuries but some property damage to the side of Stewart Hall. At about this time Lt. Magee requested aid from the National Guard, which promptly sent a force of guardsmen to assume positions around the perimeter of campus.

The policemen and patrolmen regrouped, and from Stewart Hall they began a march eastward along Lynch Street to provide security for the fire truck which had moved to a new location. With them was "Thompson's Tank," an armored bus or truck of the JPD. Students followed along the sidewalks. Numerous missiles were thrown at the officers, and many officers were struck. The obscenities continued. By the time the officers reached a point in front of the West Wing of Alexander Hall the crowd had swelled to 300 to 400 students and was unruly, so Lt. Magee halted his contingent. There was widely varying testimony from the officers as to how much time elapsed between the contingent's halting and the outbreak of firing. Lt. Magee described his own actions after the halt in this manner. He used his bullhorn to order the students to disperse, and the crowd began complying. They began to file off the street and into the courtyard in front of Alexander Hall, but, because they had to pass through a narrow gate in the fence, the process of dispersion went slowly. While the officers waited for the crowd to enter the courtyard more objects were thrown at them, and Lt. Magee was hit by one of the missiles. Nevertheless, Lt. Magee did not feel that tear gas was necessary to assist in dispersing the crowd.

> Q. While you were in front of the crowd prior to the time the shooting started, did you give any order to use the tear gas?
>
> A. [Lt. Magee]: I didn't think it was necessary at that time, the people were complying with my request.
>
> Q. They were withdrawing from the street area and dispersing as you were ordering them to do?
>
> A. Yes, sir.

The members of the detachment were equipped with a wide assortment of weapons. Most of the patrolmen, 35, carried 12 gauge pump action riot shotguns loaded with 00 buckshot. The JPD officers also had 12 gauge shotguns, but they used number 1 buckshot instead. Each shotgun shell contained nine pellets, and each pellet of either 00 or number 1 buckshot was approximately the diameter of a .30 caliber bullet. Five patrolmen carried their personal military carbines, two carried 9 mm. submachine guns, and one carried a .308 rifle. Two sergeants of the Police Department assigned specially to watch for snipers carried AR-15 rifles. The MHP patrolmen carried their weapons loaded. All but five of the policemen carried their weapons without a round in the chamber. Inside "Thompson's Tank" were 10 policemen equipped with tear gas launchers and tear gas. The remaining 16 policemen were clustered southeast of the tank, and the 43 MHP patrolmen stood generally to its west.

Shortly after the contingent had halted and when the crowd in the courtyard numbered about 400 students, a sound resembling the report of a small caliber pistol was heard. There is sufficient evidence, in the form of testimony by many officers and by newsmen, from which the jury could find that at that time the officers were fired upon by a sniper, thus hereinafter we state as fact that a sniper existed and that he fired.[3] A newsman who was in the area testified: "Shortly after we arrived I began shooting film, and it was soon after that I felt a bottle shatter at my foot, sprayed my ankle with glass. I heard a report; a bullet went past my ear and I heard it ricochet off the wall behind me." An MHP officer testified that he saw a black male break out the western pane of the third window from the bottom of the West Wing of Alexander Hall and fire

3. Plaintiffs concede that the jury could so find.

two shots in his direction from a handgun. At least 18 patrolmen testified to seeing two or three muzzle flashes come from the eastern pane of the same window. Other patrolmen saw muzzle flashes in either one of the upper windows or at the top of Alexander Hall, and a score of additional policemen and patrolmen heard shots from the general vicinity of Alexander Hall. At or about this time a patrolman and a JPD officer were struck by thrown bricks and knocked down.

Several patrolmen or policemen cried "sniper" or "sniper third floor" or "sniper third window." Almost simultaneously 38 MHP patrolmen opened fire, 30 with shotguns, five with their personal military carbines, two with submachine guns, and one with a .308 rifle. The range from where they stood to the window was approximately 20 yards. About half testified that they fired into the third floor stairwell window. Five of the patrolmen directed their fire at the brick wall alongside the upper story windows. Others directed their fire toward or just over the roof. Three patrolmen fired not at a specific window or over the roofline but at what may be described generally as the upper portions of the West Wing. One patrolman, without aiming or bringing his shotgun to his shoulder pointed it in the direction of the top of the West Wing and fired four times. Another fired first from the hip, then, as fast as he could lever shells into his gun, shot in the general direction of the top of the building. MHP Inspector Vinson did not shoot toward the West Wing at all but fired his carbine toward Roberts Hall, across Lynch Street from Alexander Hall, firing into the ground behind a running black male figure to run him under cover.

Only five JPD policemen fired their weapons. They discharged their shotguns into the air at an angle of about 85 or 90 degrees, firing a total of seven rounds of number 1 buckshot.

Throughout the barrage of gunfire Lt. Magee repeatedly called for the men to cease fire. At trial he recalled the scene:

Q. What happened when the firing broke out?

* * * * * *

A. Well, when the shooting began, naturally I flinched, any reaction, I flinched and dropped a little bit and looked up. I didn't know where the shooting was coming from. I didn't know what it was. As I looked up I saw a window in the dormitory break and just about that time something hit that transformer over my head and it exploded, and I realized the shooting was coming from my rear, and I immediately turned and took the bull horn and immediately began ordering cease fire.

Q. How many times did you order, cease fire, before the firing stopped?

A. Sir, I can't say, I don't know.

Q. Do you recall giving the testimony at your deposition that you gave the order at least three, four, or five times?

A. Yes, sir.

Q. And the firing went on all the way through that, didn't it?

A. Sir, I continually ordered, cease fire, and the order continued until the firing did cease, which I understand, was twenty something seconds. Now it took me a few seconds to turn and start giving the order.

Other officers—JPD Sergeant Lee, MHP Inspector Cooper, and MHP Inspector Jones—joined Lt. Magee in calling for cease fire. Approximately 29 seconds after the outbreak of gunfire the firing stopped. Based on defendants' own testimony, plaintiffs have calculated that during those 29 seconds the officers discharged from 121 to 153 rounds of ammunition containing between 793 and 1,001 separate projectiles.

B. THE EFFECT OF THE GUNFIRE.

The appearance of the West Wing after the firing is shown by PX 133.

From ground level to roof the central row of windows and metal panels were damaged. Portions of glass in the ground level doors had been shot away. Every pane in every window and every metal panel had been damaged. The western panes of the top window and the next window down had been virtually shot out. The eastern portion of the second window from the top, the pane behind which the sniper had been located by the testimony and at which numerous patrolmen had directed their fire, was unmarred.[4]

The effect of the fire laid down by the officers was not confined to the West Wing but ranged eastward across the center portion of Alexander Hall. The exterior of the center portion's first floor consisted of six large glass panes. Three of these six panes had been penetrated from the outside by a total of 35 projectiles, and one portion of one of the panes had been shot away. Damage from bullets or shot also ranged along the second floor of the center section, and it was here, in a TV room, that one of the non-litigant victims was shot. There were four holes in the windows of one room on the fifth floor in the eastern part of the center section, three more bullet marks below these windows, and two bullet holes through furniture in the room. The fire ranged even farther east to the East Wing, where some damage was sustained on the second floor. Finally, the FBI counted 15 holes or indentations in a retaining wall in front of Roberts Dining Hall, across the street from Alexander Hall.

Personal injuries were similarly widespread. Tuwaine Davis[4-A] was struck while in the stairwell between the third and fourth floors of the West Wing. Vernon Weakley, who had been standing at ground level in front of the West Wing, was hit in the leg. Leroy Kenter was shot as he attempted to run westward in front of the West Wing. Phillip Gibbs was found mortally wounded in the courtyard slightly to the east of the West Wing, with head wounds caused by two pellets of number 1 or 00 buckshot. James Earl Green was found on the sidewalk, across Lynch Street and in front of Roberts Hall, dead from a single pellet of number 1 or 00 buckshot that passed through his heart. Four other persons not parties to this litigation were wounded in front of and inside the entrance to the West Wing, one in the West Wing stairwell between the first and second floors, another between the second and third floors, and still another as far away as the TV lounge on the second floor of the center section of Alexander Hall.

Investigators could not trace the path of any of the projectiles to determine which specific persons fired them. Nor were shotgun pellets recovered from those wounded or killed traceable to specific weapons since a shotgun does not leave distinctive markings on its projectiles. The FBI, however, inserted a rod through holes in the double-walled metal panels and sighted along the rod's length. Seventeen sightings were made, and each indicated the projectile causing the hole originated from a point on Lynch Street where the MHP patrolmen had been clustered.

The barrage of gunfire far exceeded the response that was appropriate for a detachment the size of this one and under the circumstances which it faced. This conclusion is not judicial second guessing of officers faced with danger, rendered from the quiet and safety of judges' chambers. It is what the evidence shows. The testimony touching the issue of appropriate response from a large detachment coming under sniper

4. The FBI, which conducted an investigation after the shooting, counted 250 holes or indentations in the windows, surrounding metal frames, and metal panels. This tally did not include holes or indentations in the glass doors at ground level and indentations in the walls alongside the windows. Obviously, it did not include marks from any projectiles that may have passed through portions of windows shot out.

4-A. Since married. Now Mrs. Tuwaine Davis Whitehead.

fire uniformly rejected as unacceptable the barrage that took place at Jackson State. Under the evidence, the fire was excessive in volume and in intensity, and the size of the area subjected to fire was beyond the physical limits of justifiable response. Neither at trial nor on appeal have the MHP defendants, to whom the issue was particularly significant, squarely addressed themselves to the issue of overall excessiveness of response. Instead they have assumed that the validity of responsive action is measured solely by inquiring whether each officer was authorized to respond in the exercise of his individual discretion. They have not wrestled with whether such an authorization was improper because it might produce an excessive cumulated use of deadly force such as occurred in this instance.

Major General Walter Johnson, commanding officer of the Mississippi National Guard (who was at Jackson State the night of the shooting but not at the scene), testified concerning Guard procedures under sniper fire. He described the Guard's methods of crowd control—use of large numbers of people, non-lethal gas, riot control batons, rifle butts, riot guns "not loaded with buck shot but loaded with No. 9 bird shot, aiming not at the face but at the knees," and overall the use of minimum physical force. He testified also:

Q. What has the reaction of the Guard been to the sound of small-arms fire?

A. They [guardsmen] hold their formation. Now I don't mean to imply that we won't react if we are ever fired upon and someone is hit. I take a pretty dim view of someone shooting out of a darkened building or behind a tree or something like that and hitting one of my men. I take a pretty dim view of that and of course I would react, I think, properly. I don't think a sniper has any—I think he just forfeits all his rights when he starts sniping.

* * * * * *

Q. Under what circumstances would an order be given to return fire? [Except for small patrols, the Guard permits return fire only upon the command of an officer to load and fire.]

A. If we actually took fire—in other words a ricochet by your foot or something like that—now we are not going to fire into a crowd because we've picked up one. But if we can isolate this man we will first try to capture him, but if he can't be captured he will be [k]illed. We have specially trained sniper teams with sniperscopes, infra-red night firing sniperscopes. We have heav[y] lights. Very often, as has been reported, say, in Watts, you will get a lot of sniper fire from tops of buildings or from the dark, and we will try to search out and put a stop to that.

Q. If your men were in front of a darkened building and sniper fire started coming from a window, what would their response be according to your standard operating procedure?

A. Probably give the order to take cover and disperse immediately. No point in just standing there. We would take cover and protect ourselves and the special sniper teams would attempt to search out, seize or destroy.

Q. Would this be true if it were a riot control situation as well?

A. I don't follow you.

[Q] Well, let's say in addition to having a single sniper possibly firing from a window you had people on the street milling about, some of them hurling objects, some of them shouting epithets. Would that answer that you gave hold true as well?

A. We would probably lay down a tear gas barrage or CS barrage.

Wesley Pomeroy, a career law enforcement officer and an expert in the con-

trol of civil disturbances testified. Previously he had advised the JPD as a consultant. He had planned and directed a five-day seminar at the University of Mississippi for Mississippi law enforcement officers, called "Days of Dissent."[5] He testified without contradiction that according to standards generally accepted by law enforcement agencies throughout the United States, firepower of the kind used at Jackson State was never an appropriate response to sniper fire, particularly when there are large numbers of people in the vicinity. He gave as his opinion that the firepower used at Jackson State was unwarranted because:

> [A]ccording to generally accepted, universal[ly] accepted standards by law enforcement throughout the United States massive retailatory [sic] general firing power of that kind is never an appropriate response to sniper fire, particularly when there is a number of other people who are in the vicinity who are not participants.[6]

Additionally, the two sergeants of the JPD who were trained, equipped and designated to deal with snipers never fired. Most of the JPD officers withheld their fire, while the five who did discharge their weapons fired a total of seven rounds into the air.

We turn now to questions of liability.

C. STATE AND CITY IMMUNITY FROM SUIT.

[2–4] The trial judge correctly held that both the state and the city enjoyed sovereign immunity. The state's claim of immunity from suit in a federal court bottomed on the Eleventh Amendment is a good defense. See, *e. g.*, Wright, Federal Courts, 2d ed. § 46. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), which permitted a cause of action against federal agents for violation of certain constitutional rights although Congress had enacted no statute creating such a cause of action, has not destroyed or supplanted in part the immunity conferred upon states by the Eleventh Amendment.

The city is immune from suits brought under § 1983. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); City of Kenosha v. Bruno, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973).

Under Mississippi law, in the absence of express statutory authority, the state cannot be sued for the negligence of its officers, agents or employees. Lowndes County v. State Highway Comm'n, 220 So.2d 349 (Miss.1969); Curtis v. State Highway Comm'n, 195 So.2d 497 (Miss. 1967); Horne v. State Bldg. Comm'n, 233 Miss. 810, 103 So.2d 373 (1958);

5. Pomeroy served as a uniformed officer with the California Highway Patrol and later as undersheriff of a California area where he was in charge of civil disturbance duties. He has directed conferences on prevention and control of civil disorders sponsored by the International Association of Chiefs of Police and funded by the Department of Justice. Later he became special assistant to the Attorney General of the United States charged with procedures for protecting U. S. government buildings from civil disorders, and served as liaison or coordinator in dealing with several civil disturbances, and he became Associate Administrator of the LEAA (Law Enforcement Assistance Administration).

Pomeroy resigned from LEAA to become a consultant on prevention and control of civil disorders, and it was in this capacity that he advised the JPD and conducted the University of Mississippi seminars. In addition to his work as consultant he is Director of Safety and Development for the University of Minnesota.

6. Additionally, the evidence disclosed that the second phase of large detachment anti-sniper action is to send a team into the building to find and subdue the pinned down sniper. That procedure was never carried out at Jackson State. There is no substantial evidence that any search was even made of the particular window area or the stairwell to find if the sniper had been killed, wounded, or had escaped.

Ayres v. Board of Trustees, 134 Miss. 363, 98 So. 847 (1924). And a city is immune from liability for the torts of its police officers. "This State, along with the overwhelming majority of the others, adheres to the rule that municipalities are immune from liability for the torts of its officers, agents, and employees while engaged solely in matters pertaining to the police powers of the city." Anderson v. Vanderslice, 240 Miss. 55, 126 So.2d 522 (1961). Accord, Twiner v. Jenkins, 257 So.2d 488 (Miss. 1972); Simpson v. Poindexter, 241 Miss. 854, 133 So.2d 286 (1961); City of Hattiesburg v. Buckalew, 240 Miss. 323, 127 So.2d 428 (1961); Bates v. City of McComb, 181 Miss. 336, 179 So. 737 (1938).

D. SOURCES OF LIABILITY.

[5, 6] Throughout the remainder of this opinion we refer to the common law of tort with particular reference to Mississippi law. In the context of the present case any liability of the defendants under § 1983 could be no broader than their liability under Mississippi law. In Whirl v. Kern, 407 F.2d 781 (CA5, 1969), we held that an "improper motive" or purpose on the part of defendants was not an element of a cause of action under § 1983. We noted, however, citing Pierson v. Ray, 386 U.S. 547, 557, 87 S.Ct. 1213, 1219, 18 L.Ed.2d 288, 296 (1967), that, "the purpose with which an unconstitutional act is done is highly relevant to recovery under § 1983, but relevant more as a source of defenses springing out of the common law of torts than as an obstacle to the statement of a § 1983 cause of action." *Id.* 407 F.2d at 789. See also Scott v. Vandiver, 476 F.2d 238, 242 (CA4, 1973) (federal court may allow raising defenses recognized by state common law to contest a § 1983 claim); Tuley v. Heyd, 482 F.2d 590, 594 (CA5, 1973) (question of sheriff's vicarious liability under § 1983 for acts of his deputy is controlled by state law); Martin v. Duffie, 463 F.2d 464, 468 (CA10, 1972) (federal courts look to, though they are not bound by, state decisions in formulating standards in civil rights actions). We entertain no doubts that the privilege of individual police officers to fire in self defense or to quell a riot are such common law defenses and may be asserted in response to the § 1983 cause of action to the same extent that they are relevant to the pendant Mississippi law claim. Similarly the Mississippi and general tort law requirements respecting proof of causation are so much a part of "the background of tort liability that makes a man responsible for the natural consequences of his actions," Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), that it is necessary to apply them to the § 1983 claim in this case. *See, e. g.*, Pierson v. Ray, 386 U.S. 547, 555, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288, 295 (1967) ("prevailing view [of tort law] in this country" relied on in establishing standards for false arrest type action under § 1983); Anderson v. Nosser, 456 F.2d 835, 841 (CA5, 1972) (en banc) (applying general tort principles of proximate causation to support a jury verdict for defendants in a § 1983 action).[6A]

6A. We indicate in the text that § 1983 liability in this case would be no broader than liability under Mississippi law. Similarly we suspect that it would be no narrower, see generally 42 U.S.C. § 1988 and our interpretation thereof in Brazier v. Cherry, 293 F.2d 401, 409 (CA 5, 1961), though we need not decide that question here. It is arguable that § 1983 requires conduct approximating that involved in an intentional tort even though "specific intent" or "improper motive" is clearly not required. See W. McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I, 60 Va.L.Rev. 1, 54-55 (1974). The Fourth Circuit, however, has applied § 1983 to grossly negligent conduct, Jenkins v. Averett, 424 F.2d 1228 (CA 4, 1970), and it is arguable that we have done so in Whirl v. Kern, 407 F.2d 781 (CA 5, 1969). See Jenkins v. Averett, *supra*, and Byrd v. Brishke, 466 F.2d 6 (CA 7, 1972), both of which read *Whirl* as based on the defendant's negligence. See also Robinson v. Jordan, 494 F.2d 793, p. 795 (CA 5, 1974). *Cf.*, Roberts v. Williams, 456 F.2d 819 (CA 5, 1972); Anderson v. Nosser, 456 F.2d 835 (CA 5, 1972) (en banc). It is not

[7] Mississippi imposes the highest degree of care upon a person handling firearms.

The highest degree of care is exacted of a person handling firearms. They are extraordinarily dangerous, and in using them extraordinary care should be exercised to prevent injury to others. We quote from Cooley on Torts (3d Ed.) p. 1232, as follows: "A high degree of care is necessary in the use or manipulation of loaded weapons in the presence or vicinity of other persons, and where injury results from a failure to exercise such care the defendant is liable." We take the following rule from Barrows on Negligence, p. 367: "The bearer of loaded firearms is bound to exercise the utmost diligence in their handling, and he is liable for any injury caused by their discharge, unless it appear that he was entirely without fault."

State to Use of Johnston v. Cunningham, 107 Miss. 140, 65 So. 115, 118 (1914), (in which an officer fired over the head of a fleeing misdemeanant). See also Roberts v. Williams, 302 F.Supp. 972, 986 (N.D.Miss.1969), aff'd, 456 F. 2d 819 (CA5, 1971), cert. denied, 404 U. S. 866, 92 S.Ct. 83, 30 L.Ed.2d 110 (1971), modified, 456 F.2d 834 (CA5, 1972).

[8] The defendant officers claim that their conduct, even if otherwise it would not comply with Mississippi's very high standard of care, was justified by privileges which made it not tortious. They assert the privilege of self defense and the privilege incident to the existence of a riot. With respect to self defense, under general principles of tort law one is entitled as a matter of self defense to employ deadly force to repel deadly force. Restatement Second of Torts (hereinafter "Restatement Second") § 65. Under Mississippi law retreat is not a prerequisite to use of deadly force. McCall v. State, 29 So. 1003 (Miss.1901); Conner v. State, 13 So. 934 (Miss.1893). There was evidence from which a jury could conclude, with respect to almost all officers, that each was within the scope of the privilege of self defense. Substantially all officers were aware that deadly force in the form of sniper fire was being exerted. Nearly all testified to fear of death or serious bodily harm from that fire.

[9, 10] With respect to riot, under general principles one may use deadly force "for the purpose of suppressing a riot or preventing the other [person] from participating in it . . . if the riot is one which threatens death or serious bodily harm." Restatement Second § 142(2). In this case a jury could find that there was in progress "an assemblage of three or more persons in a public place for the purpose of accomplishing by concerted action and in a turbulent and disorderly manner a common purpose," id. § 142, Comment a.[7] It was not necessary that the avowed purpose of the participants in the assemblage be that described in § 142 of the Restatement Second but only that the conduct of the participants was such as to create the probability or even the

necessary for us to and we do not decide here whether negligence or gross negligence is sufficient under § 1983. Nor do we decide whether the conduct of the individual officers in this case could fairly be characterized as "intentional" for purposes of § 1983. Rather our analysis proceeds in terms of application of Mississippi law to the pendent state claim, since even if we concluded that the § 1983 claim ultimately failed it is clearly substantial enough, and the factors of judicial economy compelling enough, to give us jurisdiction over the pendent claim under United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966), and its progeny.

7. This was the language which the judge used in his charge. Insofar as this case is concerned, it is not materially different from the Mississippi statutory definition:

"A 'riot' is any use of force or violence disturbing the public peace, or any threat to use such force and violence, if accompanied by immediate power of execution, by two (2) or more persons acting together and without authority of law."

Miss.Code Ann. § 2361.5-01(A) (repealed with the enactment of the 1972 Code).

possibility of such consequences. *Id.* comment g.

[11] Under these standards the jury could find that a riot was in progress even though at the precise time of the firing the crowd in front of Alexander Hall was beginning to disperse at the orders of Lt. Magee and at the moment there were no overt acts sufficient to cause Lt. Magee to believe tear gas necessary. The absence of disorderly acts at the precise moment was not determinative. The crux of the matter was an assemblage with the aim of accomplishing a common purpose by turbulent action and in a disorderly manner. The jury could conclude that the riot was one which threatened death or serious bodily harm. Prior to the time firing began numerous officers had been struck by missiles, and some of them injured, and two had just been felled by bricks. The fire from the sniper was part and parcel of the situation.

[12] The privilege of employing deadly force to subdue a riot was not made inapplicable by the fact that in his opening statement and in argument before the trial court counsel for the MHP defendants stated that his clients did not rely upon the justification of quelling a riot, or by the fact that in testimony no MHP officer characterized his firing in riot-suppression terms. The testimony of each officer, describing his action in terms of defense against sniper fire or of pinning down the sniper, or both, did not eliminate the jury's right to recognize the sniper fire as a particularized aspect of the riot, indeed at the moment perhaps its most inflammatory and most dangerous aspect, and conclude that in firing responsively the officers were quelling the sniper fire and dissuading others from joining in.[8]

Under the fact of this case the privilege of self defense and the privilege of use of deadly force relating to a riot partially overlap. As we have held, a jury could conclude that a riot was in progress,[9] that it threatened death or serious bodily harm, and that the sniper was part and parcel of the situation. A jury could consider whether fire directed at the sniper for defensive purposes was within the contours of fire tending to quell the riot in general or the sniper as a particular part thereof or tending to dissuade others from joining in the riot in any manner. A jury could also consider whether fire to quell the riot (or the sniper as an element thereof) or to dissuade others from joining in the riot was delivered in such a manner as to be within the contours of fire for self defense.

[13, 14] Inquiry must then turn to the allowable scope of permitted deadly force and the manner of its employment. A privilege to use deadly force is not unrestrained; rather it is subject to limitations of scope and of manner of exercise. When self defense is claimed, the actor is not privileged to use any means which is intended or likely to cause bodily harm in excess of that which he correctly or reasonably believes to be necessary for his protection. Restatement Second § 70(1). Comment b. to that subsection provides:

> *b. How reasonableness of means determined.* In determining whether a particular means is or is not excessive, the amount of force exerted, the means or instrument by which it is applied, the manner or method of applying it and the circumstances under which it is applied are factors to be considered. There may, under ordinary circumstances, be a privilege to apply a particular amount of force, to apply it in a particular way, or to use a particular weapon, but the circumstances which are known or which should be known to the actor may be such as to indicate to a reasonable man in the actor's position that the

8. The trial judge, separating the issues from the semantics more perceptively than did counsel, properly charged the jury on riot as a justification.

9. See text at footnote 7, *supra*.

use of this ordinarily privileged means may involve a danger of harm to the other which the actor is not privileged to inflict intentionally. Thus, a man may be privileged to knock another down if the other threatens him with violence, where both are upon a street or lawn, but he is not privileged to do so if the other is standing on the brink of a precipice or if he knows or should know that the other is suffering from heart disease.

Whether a means of self-defense is excessive depends upon the bodily harm or confinement which the actor intends to cause, or the harm which he has reason to believe is likely to result. Thus, means are excessive if the actor should realize that they are likely to do more harm or impose a greater confinement than he either intends or is privileged to inflict; but they do not become excessive because they unforeseeably result in such harm or confinement.

The actor must believe that the means which he applies are necessary to prevent the apprehended harm and not merely that they are likely to be effective in preventing it. Not only must the actor so believe, but, except where the means are actually necessary, his belief must be reasonable, that is, the circumstances which are known or should be known to the actor must be such that a reasonable man would so believe. In this connection, the qualities which primarily characterize a reasonable man are ordinary courage and firmness.

The actor must consider whether lesser force will prevent the apprehended harm. Thus Comment c. provides:

c. When lesser force would afford adequate protection. The actor is not privileged to apply a particular force if he knows or should know that the apprehended harm can be prevented by the application of a force less in kind or degree; and this is true though the force applied is such as would be privileged if the actor reasonably believed that the apprehended harm could only be prevented by its use. In determining whether the actor is privileged, allowance must be made for the exigency in which the actor is placed by the other's conduct, and the necessity for a rapid decision as to the means which he will use in his own defense. Even the most reasonable of men, confronted with the necessity of defending himself against a real or apparent attack, cannot be expected to measure accurately the exact amount of force necessary to repel it. It is only where there is a glaring discrepancy between the force applied and that which is necessary to prevent the apprehended harm, or where it is obvious that the actor knows or should know that he can defend himself by a lesser force that it is for the court to rule that the force applied is excessive. Otherwise it is for the jury to determine whether the force is or is not excessive.

[15] A privilege must be exercised with due regard for the interests of third persons. A privilege to use deadly force is not a hunting license entitling the privileged person to strike without regard to risk of harm to third persons.

§ 75. *Liability to Third Person*

An act which is privileged for the purpose of protecting the actor from a harmful or offensive contact or other invasion of his interests of personality subjects the actor to liability to a third person for any harm unintentionally done to him only if the actor realizes or should realize that his act creates an unreasonable risk of causing such harm.

* * * * * *

Comment:

a. This Section states the rule that one who unintentionally harms a third person by an act which is privileged as self-defense against a real or supposed assailant is subject to liability if, but only if, his act is negligent toward such third person as creating an

undue and so unreasonable risk of causing an invasion or impairment of some of the legally protected interests of the third person.

b. In determining whether the actor as a reasonable man should be aware that his act creates an unreasonable risk of causing an invasion of any of the third person's interests of personality, the factors which are to be considered are similar to those which determine the existence of negligence in many other situations. These factors and the importance attached to them are stated in Chapter 12. The exigency in which the actor is placed, though not due to the third person's conduct, with its attendant necessity of an almost instantaneous choice of a means of self-defense, is here a factor of great importance. So, too, is the comparison between the value of the respective interests of the actor and the third person, and the amount of harm likely to result to each if the actor adopts or refrains from adopting the particular means of self-defense which he employs.

Restatement Second § 75.[10]

In Dillon v. Crowe, 406 F.2d 1321 (CA5, 1969), we recognized the dual limiting factors of scope of force and manner of exercise. Officers had raided a dice game and arrested participants, a scuffle ensued between an officer and a gambler, the officer attempted to draw his pistol to enforce the arrest, and it accidentally discharged when the gambler struck his arm. The bullet struck plaintiff's decedent. We affirmed a judgment for the officer-defendant, holding that the facts supported the conclusion that the officer used only such force as was necessary and that he was not negligent. With respect to scope of allowable force, Mississippi has held liable an officer who shot and killed a misdemeanant attempting to escape custody, holding that the officer's exercise of deadly force is limited to that necessary to subdue the efforts to escape and that even then he cannot take the prisoner's life or inflict great bodily harm on the prisoner except to save his own life or prevent like harm to himself. Brown v. Weaver, 76 Miss. 7, 23 So. 388 (1898); Holland v. Martin, 214 Miss. 1, 56 So.2d 398 (1952); Moore v. Foster, 182 Miss. 15, 180 So. 73 (1938). To like effect, where the sheriff shot in attempting to stop a youth fleeing arrest on a misdemeanor charge, see State v. Cunningham, *supra*.

[16] We conclude that the limits of the privilege relating to riot are similar. The privileged actor may not use means intended or likely to cause bodily harm in excess of that which he correctly or reasonably believes to be necessary to quell the riot or to dissuade others from participating.

[17] One having a privilege but exceeding the scope of conduct which it allows is liable for so much of the force exerted by him as is excessive. *See, e. g.*, Restatement Second §§ 71 and 144; 6 Am.Jur.2d, Assault & Battery § 162; Fraguglia v. Sala, 17 Cal.App.2d 738, 62 P.2d 783 (1936); Bethley v. Cochrane, 77 So.2d 228 (Ct.App.La., 1955). Where it is not possible to separate harm caused to the victim by authorized force and that caused by an excess of force, the actor is liable for all of the harm. Restatement Second § 71, Comment *b*.

The training of MHP members in control of crowds and of riot and sniper situations became of great if not central importance in determining whether the conduct of the officers in handling firearms was reasonable under Mississippi standards of care, whether conduct that otherwise might be tortious was privileged, and whether the scope of privileged conduct was exceeded.[11] Plaintiffs

10. For example, some of the officers testified that an officer coming under fire of a sniper closely surrounded by a crowd would not be free to respond by shooting indiscriminately into the crowd.

11. The procedures of the JPD are evidentiary of what is appropriate for police officers in general but are less central to the case since we hold that directed verdicts against JPD officers who fired were properly denied on other grounds.

contend that under Mississippi law the training of the MHP constituted administrative regulations the breach of which was negligence per se. We do not agree.

Breaches of statutes have been held to constitute per se negligence in Mississippi. See Daniels v. Adkins Protective Serv., Inc., 247 So.2d 710, 712 (Miss. 1971); Illinois Cent. R. Co. v. Bethea, 88 Miss. 119, 40 So. 813 (1906); Mobile & O. R. Co. v. Roberts, 23 So. 393 (Miss.1898). In Robertson v. Yazoo & M. V. R. Co., 154 Miss. 182, 122 So. 371 (1929), the court adopted in toto § 176 of the Tentative Draft of the First Restatement, which became § 286 of the First Restatement.

Section 286 was changed when carried forward to the Second Restatement. It now makes acceptance of a statute as the appropriate standard of care discretionary with the court. ("The court *may* adopt . . . ."). As the comments make clear, use of the discretionary "may" was not accidental:

> [The regulation] . . . may merely prohibit certain conduct, and contain no provision for any liability at all. In such cases the initial question is whether the legislation or regulation is to be given any effect in a civil suit. Since the legislation has not so provided, the court is under no compulsion to accept it as defining any standard of conduct for purposes of a tort action.

Restatement Second § 286, Comment *d*.

Daniels v. Adkins Protective Serv., Inc., *supra*, a 1971 case, discusses the effect of a violation of law upon the negligence issue. It points to the conclusion that the Second Restatement's reformulation of § 286, which was completed in 1963, would find no favor in Mississippi, and that the more rigid First Restatement rule would prevail, leaving courts no discretion to decline to regard a statutory violation as conclusive proof of negligence.

[18] The First Restatement, however, spoke only of "legislative enactments." It made no mention of either ordinances or administrative regulations. There appear to be no Mississippi cases expressly applying the doctrine to violations of administrative regulations. In view, however, of Mobile & O. R. Co. v. Roberts, *supra*,[12] we believe that the Mississippi courts, if they faced the question, would give some weight to violation of administrative regulations in considering the negligence issue. But that does not end the analysis. The theory of what is loosely called statutory negligence or negligence per se is that a clear official definition of appropriate conduct[13] should be regarded as evidence of the proper standard of care for the reasonable man.[14] That theory is undercut when, as here, there has been no clear official definition. MHP training in crowd control and related subjects was neither reduced to precise form nor was it the subject of any formal adoption procedure. Rather, the subject matter was part of patrol training, communicated to patrolmen and trainees through programs conducted by various officers at various times and places. Commissioner Crisler explained that every recruit receives riot control training in recruit school, and every patrol member receives yearly in-service training in that subject, and in addition, some of the Highway Patrol Districts conduct training on their own. The content of such training was described at trial through the oral testimony of those teaching and those taught, and the de-

12. In *Mobile* the Mississippi Supreme Court in dictum appeared willing to give negligence per se effect to the violation by a railroad company of its own operational rule that trains were to follow each other at intervals of no less than 10 minutes.

13. Or, more usually, a definition of conduct not appropriate.

14. Under § 286 of the First Restatement the statute is conclusive evidence, requiring the judge to direct a verdict of negligence in violation is proved. The Second Restatement formulation accords the judge discretion to regard the statute as probative of the correct standard of care but not conclusive.

scriptions varied considerably. We think that under such circumstances the Mississippi Supreme Court, if it gave the training any weight, would regard it as no more than probative of the correct standard of care and not as conclusive.[15]

As we have pointed out, the testimony of MHP officers regarding their training varied considerably. In ruling on motions for directed verdict the court was required to give effect to that testimony of the officers and of the experts tending to give to the officers the widest latitude of conduct. Considered in this manner, the testimony embraced training in what may be generally described as two separate (but overlapping) types of responsive fire that individual officers could engage in when subjected to the fire of a sniper-defensive fire and fire to "pin down" the sniper. Defensive fire embraces the privilege of the officer to fire at the sniper or at his location when the officer fears that he or his fellow officers are in danger of death or serious bodily harm from the sniper's fire. In effect it is an embodiment in police training of the right to act in self defense against a particular kind of deadly force. Before an officer can fire in this manner he must have either actually observed the sniper or definitely established his location. The fire is directed at the particularized point where the sniper has been observed or located, and it may kill or injure the sniper or as a minimum silence him. There was voluminous testimony that an individual officer receiving sniper fire can fire defensively on his own initiative without command if he thinks his own life or that of a fellow officer is threatened, if he knows that he is being fired upon by a sniper and if he has actually sighted or otherwise located him. Also there was substantial testimony that this right of the MHP officer to act defensively on his own initiative exists even if he is a member of a large detachment.

Fire to pin down the sniper is a somewhat broader concept. Its purpose is not necessarily to kill or wound the sniper but to cause him to stop firing, to stay down, and to remain in place. Its purpose may be achieved by firing at a place or places not precisely limited to the sniper's exact location. MHP officers testified that any member of a large detachment can fire without command to pin down a sniper. Locating him precisely is not a sine qua non. For example, an officer may call out "sniper fire at three o'clock" to identify an approximate direction from which fire is coming. Once a direction is established officers may fire and are not limited to a precisely targeted spot.

[19] Obviously, the two concepts of type of fire overlap. Defensive fire may pin the sniper down. Fire to pin him down may kill or wound him. Either type of fire will, hopefully, silence him. Additionally, fire to pin down a sniper can be considered as a form of self-defense (less stringent because not necessarily directed precisely at the sniper or his location) or a particularized form of quelling a riot. Both types of fire, comprising particularized training given to MHP officers concerning what they can and should do in the face of sniper fire, are, of course, subject to the same limitations as other forms of privileged deadly force with respect to the interests of third persons—the actor is liable if he realizes or should realize that his acts create an unreasonable risk of harm to third persons. Restatement Second § 75.

E. LIABILITY OF OFFICERS WHO FIRED.

[20] We have considered officer by officer the liability of those who fired their weapons.

15. The District Judge was of the same view. He charged that the training, regulations and procedures for crowd and riot control adopted by the MHP and the JPD were evidence of reasonable conduct and the degree of care required, and failure to follow such instructions could be considered as evidence of negligence.

At the threshold, there was no error in denying the motions for directed verdicts against the five JPD officers who fired. Under the undisputed evidence all of them shot into the air at an angle approaching 90 degrees. A jury could find that their action was an acceptable procedure for meeting a riot situation without undue risk of harm to persons at the scene and that they were guilty of no tortious conduct.

Under Boeing v. Shipman [16] standards we have scrutinized the testimony of each MHP defendant who fired. With respect to 31 of the 38 we find without hesitation that there was sufficient evidence on which a jury could conclude that each's respective acts of firing were not unreasonable under the circumstances,[17] or if otherwise unreasonable were justified under the privilege of self defense or the privilege relating to riot, and a jury could find that the fire laid down by each did not exceed that necessary for the purpose and was not otherwise delivered negligently.

With respect to the remaining seven MHP defendants who fired, the issue of possible liability as a matter of law is closer. We discuss the acts of these seven separately. After the shooting began, Assistant Inspector Charles G. Vinson saw a black male figure come out of bushes in front of the dining hall (across the street from Alexander Hall and thus generally behind the detachment) and run to the west. He fired three or four aimed shots from his carbine into the grass 20 feet or less behind the running figure "to run 'em under cover." Vinson does not claim that the person was a sniper, in fact Vinson could not tell whether he was armed. If Vinson was within a privilege it was that relating to a riot. No explanation was offered of the necessity or desirability of forcing one out of several hundred persons present to take cover, whatever that meant in these circumstances. Patrolman Jerry Arthur Jones saw a flash from the window, heard two reports, and fired two to four rounds from his shotgun, "just as fast as I could jack another one in." The first shot was fired from the hip as he brought his gun up, not aimed but in the direction of "somewhere toward the top of the building." He considered that he did not have time to aim at the window and thought it possible that this shot may have gone into the top window instead. Patrolman James Woodrow Bennett, without ever identifying a possible source of sniper fire and without bringing his shotgun to his shoulder or aiming it, fired five times, once into the air from a high port position, four more times by "pointing" his shotgun toward the top of the building. Patrolman Joseph Wayne Braun saw two flashes of fire from the second window down and then raked the top of the dormitory with a 10 round burst from a submachine gun set to fire automatically at 700 rounds per minute.[18] Investigator Ralph Curtis McClain identified the second window down as the source of sniper fire but rather than fire at that location shot just over the roof line on the theory that anyone there would be a sniper and that he was entitled to fire at anyone on the roof whether sniper or not. Patrolman Donald Robert Blackwell identified no location as the source of fire but nevertheless shot into the second window from the top because he thought sounds of fire came from that direction and because others were firing into that window. Patrolman Billy Frank Wheeler heard shots, could not tell where they came from, and fired two rounds from his shotgun into the window because he saw a movement of the curtains.

16. 411 F.2d 365 (CA 5, 1969) (en banc).

17. For example, a few MHP officers testified that, like the five JPD officers, they fired into the air, although not at so high an angle. Without regard to privilege a jury could find that this did not breach Mississippi's standard of care.

18. Had every officer fired 10 times, the detachment would have shot 690 times, and the number of projectiles would have been in the thousands.

[21, 22] Even if, however, any one or more of these seven was liable as a matter of law (by failing to bring himself within any privilege, or, if privileged, by employing excessive deadly force or by employing privileged force in a manner which he realized or should have realized created an unreasonable risk of harm to others) directed verdicts against such person(s) were properly denied because of the state of the evidence respecting causation. The proof did not establish as a matter of law that any one or more of them inflicted the harm suffered by any one or more of the victims whose claims are before us. Under the usual burden plaintiff must introduce evidence affording a reasonable basis for concluding that it is more likely than not that the conduct of defendant was a substantial factor in bringing about the harm suffered by the plaintiff. Prosser, Law of Torts § 41, p. 245 (3d ed. 1964). No plaintiff established, at most, any more than a jury question pursuant to this burden. Plaintiffs seek, however, to avoid this normal burden of proof on the authority of Moore v. Foster, 182 Miss. 15, 180 So. 73 (1938), and Oliver v. Miles, 144 Miss. 852, 110 So. 666 (1926), and on the supporting argument that in a group action situation where proof of actual causation is difficult or impossible, loss should fall on a negligent defendant who may have inflicted no harm rather than upon a blameless plaintiff injured by someone who cannot be identified. In *Oliver* two defendants who were bird shooting negligently fired their shotguns across a public highway at approximately the same time, and plaintiff was struck with a pellet which could have come from either gun. The Mississippi Supreme Court held that both defendants were negligent and both liable despite the absence of proof of who committed the actual harm, because "to hold otherwise would be to exonerate both from liability, although each was negligent, and the injury resulted from such negligence." 110 So. at 668. In *Moore*, two officers negligently fired their pistols over the head of a youth escaping arrest, and a bullet from one of the pistols struck him. The Mississippi Supreme Court, citing *Oliver*, held that both officers would be liable (only one of them was sued).

[23] As we understand them, these two cases do not impose liability as a matter of law on multiple defendants merely upon proof that as a matter of law they negligently fired weapons. Professor Prosser describes cases such as *Moore* and *Oliver* as examples of "clearly established double fault and alternative liability."

> There is one special type of situation in which the usual rule that the burden of proof as to causation is on the plaintiff has been relaxed. It may be called that of clearly established double fault and alternative liability. Where, for example, two defendants negligently shoot across a public highway at the same time, and the plaintiff is struck by one shot, which might have been fired from either gun, it is clear that both marksmen were at fault, and that one of them, and only one, has caused the injury. Instead of dismissing the action against both for lack of a preponderance of proof against either, the courts have displayed some eagerness to find concert of action, and so permit recovery against both.[51]

51. Oliver v. Miles, 1927, 144 Miss. 852, 110 So. 666; Benson v. Ross, 1906, 143 Mich. 452, 106 N.W. 1120; Kuhn v. Bader, 1951, 89 Ohio App. 203, 101 N.E.2d 322; cf. Regina v. Salmon, 1880, 6 Q.B.D. 79; State v. Newberg, 1929, 129 Or. 564, 278 P. 568.

In this situation the California supreme court has solved the problem by placing the burden of proof on the issue of causation upon the two defendants.[52] There is support for

52. Summers v. Tice, 1948, 33 Cal.2d 80, 199 P.2d 1, 5 A.L.R.2d 91. The court merely extended the rule as to the burden of proof on the issue of apportionment of damages. See infra, p. 254.

this in two Canadian decisions,[53] and in American automobile cases of "chain collisions," in which the plaintiff is injured by one of two or more negligently driven cars, but cannot prove which.[54] It seems a very desirable solution where negligence on the part of both defendants is clear, and it is only the issue of causation which is in doubt, so that the choice must be made between letting the loss due to failure of proof fall upon the innocent plaintiff or the culpable defendants. But where there is no evidence even as to where culpability lies, the hardship may be equally great upon an innocent defendant; and except in very special cases the courts have refused to shift the burden of proof.

Prosser, Law of Torts, § 41, p. 247 (3d ed. 1964). In *Moore* and *Oliver*, only two actors were involved as potential sources of harm and the appellate court accepted as established facts that both fired negligently, that both shot in the direction of the victim, and that injury was caused by a missile originating from one weapon or the other. In the instant case there are many actors potentially the source of harm. There was evidence of sufficient weight to go to a jury tending to show that some defendants firing (at least 31) did not do so negligently and that harm may have resulted from sources other than those acting tortiously. We are pointed to nothing in Mississippi law indicating that in such a multiple actor situation the courts of that state would hold that as a matter of law actual causation was established with respect to tortious defendants, or to state it differently, that liability attaches to tortious defendants without regard to proof of actual cause of injury.[19] Nor are we cited to any jurisdiction with a rule applicable to like situations that would entitle plaintiffs to directed verdicts with respect to causation. We turn then to the Restatement, which speaks in terms of a shift of burden to the defendants.

> (1) Except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff.
>
> * * * * * *
>
> (3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

53. Cook v. Lewis, [1952] 1 Dom.L.Rep. 1, [1951] S.C.Rep. 830 (similar facts); Saint-Pierre v. McCarthy, [1957] Quebec Rep. 421 (merchants selling cartridges to boys).

54. Murphy v. Taxicabs of Louisville, Inc., Ky.1959, 330 S.W.2d 395; Cummings v. Kendall, 1940, 41 Cal.App.2d 549, 107 P.2d 282; Eramdjian v. Interstate Bakery Corp., 1957, 153 Cal.App.2d 590, 315 P.2d 19; Copley v. Putter, 1949, 93 Cal.App.2d 453, 207 P.2d 876. Cf. Micelli v. Hirsch, Ohio App.1948, 83 N.E.2d 240 (result accomplished by presumption of continuing life). See also, as to apportionment of damages, infra, p. 255.

19. The general rule in Mississippi appears to be that of Blizzard v. Fitzsimmons, 193 Miss. 484, 10 So.2d 343 (1942), holding that no recovery can be had where there is no showing which of several possible causes produced the injury where some of the causes do not involve the negligence of the party charged. The Mississippi courts have distinguished *Blizzard* in some specialized situations. See, e. g., Hinds-Rankin Metropolitan Water & S. Assn. v. Reid, 256 So.2d 373 at 379 (Miss.1971):

> "In the *Blizzard* case the evidence failed to show which of the several possible causes produced the injury. Here, the evidence is overwhelming that the contents of the sewerage lagoons was not a mere possible cause of plaintiffs' injury, but was probably the only substantial source of contamination that caused the damage to the minnows and the land. We are, therefore, of the opinion that the *Blizzard* case is not applicable to the facts of this case."

The acts of any of the instant defendants negligent as a matter of law are no more than "mere possible cause(s)" and are far from "the only substantial source of [injury]."

Restatement, Second, § 433B. This section leaves upon the plaintiff the burden of proving the existence of the threshold factors that quicken subsection (3). Comments *g* and *f* provide:

> *g.* The rule stated in Subsection (3) applies only where it is proved that each of two or more actors has acted tortiously, and that the harm has resulted from the conduct of some one of them. On these issues the plaintiff has still the burden of proof.
>
> * * * * * *
>
> *f.* Subsection (3) states a further exception [arising] . . . where the conduct of two or more actors has been proved to be negligent or otherwise tortious, and it is also proved that the harm to the plaintiff has been caused by the conduct of only one of them, but there is uncertainty as to which one.
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> * * * * * *

See also Illustrations 9. and 11. *Id.* at p. 447. Taking the view most favorable to the plaintiffs, the evidence at least required that both of the two threshold issues referred to in comment *g.* be submitted to the jury. With respect to the question of who acted tortiously, there was evidence under which a jury could find that the fire of at least 31 MHP defendants was non-tortious. With respect to source of harm, the fire which injured the plaintiffs could at least as readily have come from members of the group of 31 as from one or more of the group of seven.[20] Given the numerical disparity between the two groups, the hundreds of missiles that the jury could find validly fired, and the lack of identification of any direction of fire from a particular defendant or defendants in the group of seven and toward a particular victim or victims, the jury was entitled to find that the threshold requirements were not met, that the burden of proving cause remained on the plaintiffs and that this burden was not satisfied.[21]

[24–26] The plaintiffs also assert that all defendants are liable on a theory of joint enterprise, citing *Oliver* and *Moore*. This contention, if accepted, would avoid plaintiffs' problems regarding causation, since there is no substantial evidence that injury to the plaintiff victims came from any source other than the gunfire of the detachment. The two Mississippi cases are, however, exceptions to usual rules of proof of causation where defendants are acting tortiously, and they do not impose vicarious liability upon non-tortious actors. Nor are the actions of a law enforcement detachment, each member of which has individualized authority to act against sniper fire, consistent with the concepts of joint enterprise liability. The joint enterprise theory of liability arises by analogy to the law of partnership, usually by a contract express or implied and under circumstances in which each participant has an equal voice in conducting the enterprise, and in most instances has been restricted to automobile cases as a defensive doctrine by which the negligence of a driver is imputed to a passenger. Prosser, Law of Torts § 71, pp. 488–90 (3d ed. 1964). In this instance the detachment was under overall supervision and command of supervisors, and the officers in the ranks had been granted individual authority to act against sniper fire. In any event, whether a joint enterprise exists is a question for the jury. *Id.* at 488.

F. LIABILITY OF INDIVIDUALS ON OTHER GROUNDS.

[27] All supervisory officers on the scene are claimed to have failed to perform various command functions: Lt. Magee (in charge of the detachment), failure to inform all officers to load and

20. In fact, on a purely statistical basis, more readily.

21. An additional complicating factor is that of the group of seven defendants, five fired shotguns and two fired solid shot. Three of those whose claims are in suit were struck by shotgun pellets, but there is no evidence of what type of shot struck Kenter and Weakley.

fire only upon command, failure to be familiar with MHP procedures on crowd control; Inspector Lloyd Jones (in charge of the MHP officers), going to the aid of Patrolman Turcotte when he should have been ordering cease fire; Chief Inspector Armistead and Assistant Inspectors Vinson and Cooper (subordinates but with command functions over at least some MHP officers), failure to keep others from firing and encouraging others to fire by joining in the firing themselves. All of these alleged failures raised jury questions and could not be the basis for directed verdicts.[22]

It is clear from the volume and scope of the fire, the comparable training and procedures of other law enforcement agencies, and the testimony of the experts and of the MHP officers, that the MHP was deficient in establishing and implementing standards for conduct of large detachments in situations of riot and/or sniper fire. There were no plain distinctions between small-group and large-detachment procedures. Yet the National Guard limited individual responsive fire to soldiers on patrol. There was no clear principle that in the large detachment situation the individualized right of the officer to fire at will gave way to a right to fire only upon command, or if it continued was subject to some kind of ceiling that would prevent the cumulated individual discretionary fire of members of the detachment from escalating into a barrage (which every expert testified was both inappropriate and valueless.) Normally there is a large detachment rule that all or most men take cover rather than fire while proper anti-sniper procedures are carried out. Numerous MHP officers testified that they had no duty to take cover. The most vivid demonstration of the shortfall in MHP training was the testimony of the officers themselves. There were critical contradictions and ambiguities in the non-supervisory officers' respective understandings of what was proper for them to do in the situation. Reading their testimony, one can understand how on the night of May 15 there ensued a confused mass reaction during which, as the supervisory officers acknowledged, they lost control of the men under their supervision.

[28, 29] Commissioner Crisler was stipulated to be the person responsible for regulations and training of the MHP. He was not, however, subject to absolute liability if its procedures or training proved to be deficient but only for due care in the performance of his duties. This was a jury issue, properly submitted to that body and decided by it. Expert witness Pomeroy testified that the dangers of response by massive firepower had been learned in Watts in 1965 and Detroit in 1967. In a different context, the Supreme Court has spoken of the fact that the training, policies and procedures of law enforcement agencies relating to handling mass and mob actions are an evolving area of knowledge in which comparative judgments necessarily must be made and a wide range of dissimilar procedures may exist. Gilligan v. Morgan, 413 U.S. 1, 8, 93 S.Ct. 2440, 2444, 37 L.Ed.2d 407, 414 (1973). We cannot say that a senior police officer who, the evidence shows, has fallen short in developing procedures in this evolving and diffuse area of knowledge and in training the officers for whom he is responsible, is liable as a matter of law.[23]

For like reasons we reject the claim that there was liability as a matter of law against individual officer defendants who had prepared lesson plans for MHP training, submitted the plans to officials of MHP for approval, and then conducted training pursuant thereto.

22. Possible liability of Armistead, Cooper and Vinson based on their participation in the firing was considered under section E.

23. In this connection, Commissioner Crisler explained that the primary mission of the MHP is traffic safety, that it carries out the additional duty of riot control only upon proclamation by the governor, and when called out for such duty its task is not to assume primary control but to assist local law enforcement officers.

G. JURY CHARGES—AND SOME LOOSE ENDS.

[30] The court did not err in charging over objection that plaintiffs must prove by a preponderance of the evidence that some or all of defendants fired their weapons wrongfully or negligently. Appellants urge that the burden was not upon plaintiffs because, in firearms cases, Mississippi imposes liability upon the defendant who has discharged a firearm and injured another unless he proves he is wholly free from fault. They rely upon the last sentence of the statement in Johnston v. Cunningham, *supra*, quoted earlier at the beginning of Section D. That sentence reads as follows:

> We take the following rule from Barrows on Negligence, p. 367: "The bearer of loaded firearms is bound to exercise the utmost diligence in their handling, and he is liable for any injury caused by their discharge, unless it appear that he was entirely without fault."

65 So. at 118. The statement sets forth, and twice restates, the high degree of care that Mississippi requires in the handling of firearms. We do not construe the last sentence to be a holding that in firearms cases there is placed on the defendant a burden of proving freedom from fault and imposing liability upon him unless he disproves any and all fault. Possibly the last sentence merely emphasizes that once a departure from the rigid standard of care is proved, even if the departure is slight, the defendant will be liable. Or—and we think this more likely—it may refer to the fact that the person who has discharged a firearm under circumstances that otherwise would breach the standard of care has the opportunity to prove that he is "without fault" in the sense that he was privileged to fire, rendering non-tortious conduct that otherwise would be tortious. In the traditional calculus of tort law fault is an element and plaintiff must prove it. The above-quoted statement does not impose liability without fault but rather retains fault as an element. The Mississippi Supreme Court would hardly effect, in a single ambiguous sentence at the tail end of a textual quotation, a change in a concept as fundamental as the obligation to prove fault.

H. CONCLUSION.

We summarize the key points controlling ultimate disposition of this case. There was evidence on which the jury could find there was sniper fire and plaintiffs so concede. Under the governing Mississippi law of privilege, and with respect to most of the officers who fired, there was sufficient evidence to submit to the jury as to whether the respective officers were privileged to fire in self defense or to suppress a riot, and, if privileged, whether nevertheless they employed excessive deadly force or fired without due regard to the safety of others. With respect to a few officers, the evidence established that they were guilty of tortious conduct as a matter of law, but the question of whether any one or more of them was an actual cause of harm to any plaintiff was for the jury. Liability of supervisory and command officers was a jury issue. The State of Mississippi and the City of Jackson were immune from suit. There was no error in the jury charges.

Our conclusions make it unnecessary for us to discuss questions concerning assumption of risk, alleged immunity of individual officers from suit, and alleged liability of Crisler on respondeat superior grounds for tortious acts of individual officers.

This case was correctly submitted to the jury for decision. The jury has spoken, and the judgment entered on its verdict must be and is affirmed.

APPENDIX D

(Opinion of District Court)
S.D. Mississippi, April 5, 1972

BY THE COURT:

This Court heard all of the evidence adduced in this case and submitted to the jury all of the issues of fact which have been reargued and reiterated here today by counsel. The ultimate finder of fact found in favor of the Defendants by virtue of a general verdict, all sides having declined to ask the Court to submit the question to the Jury on special interrogatories and as a matter of fact, as I stated previously in the record, all sides desired a general verdict rather than a special verdict, or answers to special interrogatories. Therefore, I acceded to the agreement and desires and requests of counsel for all sides in that respect.

At this time it is the duty and responsibility of the Court to pass on the plaintiffs' motions for a Judgment Notwithstanding the Verdict and in the alternative for a New Trial. First, with reference to the Motion For a Judgment Notwithstanding the Verdict the Court must and does consider this motion in light of and as directed by the leading case of Boeing Company vs. Shipman, decided by the Fifth Circuit in 1969 and reported at 411 Fed.2d 365. Shipman and its progeny dictate that in considering a motion for a Judgment Notwithstanding a Verdict, Courts must consider all of the

evidence of record, not just that which supports the non-movants' case, but in the light of and with all reasonable inferences most favorable to the party opposed to the motion.

I find that there is substantial evidence which supports the jury verdict in favor of the Defendants, that is, there was evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might have reached different conclusions in this matter, and I find that there is substantial evidence to support the verdict in favor of the Defendants and that there was a conflict in the substantial evidence which created a jury question. I therefore submitted the case to the Jury but did reserve ruling under Rule 50 (b) on the motions filed by all parties. I do now for the above stated reasons overrule the Plaintiffs' Motion For a Judgment Notwithstanding the Verdict.

The next question to be considered by the Court is whether a new trial should be granted, which decision rests within the sound discretion of this Court. At this time, of course, I may consider the credibility of the witnesses and the quality and weight of the evidence and do realize that this Court does have a wide discretion provided, of course, that I must keep in mind

that the jury is the finder of what weight should be given a witness's testimony and also what weight should be given all of the evidence in a case; nevertheless, the Court, of course, must prevent any miscarriage of justice, without invading the proper performance of the fact finding role of the Jury.

This Court recognizes that it may grant a new trial if it feels that it has committed error in any of the instructions it has given or rulings which it has made, because it thinks the verdict is wrong though supported by some evidence or because the verdict is not supported by substantial evidence or because the verdict is contrary to the weight of the evidence. I feel as I did previously and for the same reasons dictated into the record during the trial of this case in overruling the plaintiffs' Motions for a Directed Verdict, that all of the questions argued here today, including those of the wrongfulness or not of the firing, self-defense, assumption of the risk, respondent superior, the adequacy of training and regulation and the violation thereof or not, were questions of fact for the decision of the Jury under proper instructions. The Court is of the opinion that the Jury was fully, adequately and correctly instructed on the law in this case to be applied to the facts as they found them to be, that the

Jury's verdict was based upon substantial evidence, that there is substantial evidence to support its verdict and that its verdict is not contrary to the overwhelming weight of the evidence. I find that this Court did not commit error in this case and that there was no miscarriage of justice by virtue of the Jury's verdict. I think that this was clearly a case in which the ultimate finder of fact, the Jury, weighed the evidence, considered the credibility of the witnesses and decided this case based thereon.

The Court reaffirms its previous ruling that the Defendants were not required to prove by a preponderance of the evidence that their firing of weapons was not wrongful once there was firing. The plaintiffs argue that it is presumed wrongful and the defendants must prove by a preponderance of the evidence that there was no justifiable reason whatever. I think that would be begging the question. I don't think the burden was shifted just because there was a firing of a weapon under the facts and circumstances of this case.

I fully instructed the Jury with regard to this matter and at plaintiffs' request I did incorporate in my instructions in two or three different places that these defendants, by virtue of the fact that they were policemen, had the duty and responsibility to exercise

a higher degree of care than anyone else firing a dangerous weapon. I instructed them that those trained in law enforcement work had a higher duty or must exercise a higher degree of care than ordinary persons under the same or similar circumstances. I also instructed them that they may consider all of the surrounding facts and circumstances in determining the question of wrongful firing, and this was submitted to them as one of the questions of fact which they evidently resolved in favor of the Defendants. Thus I feel that the Jury was properly and adequately instructed in this case.

As the ultimate finder of fact the Jury found in favor of the Defendants, and this Court is not disposed to substitute its judgment for that of the Jury under these facts and circumstances. I will therefore overrule the motions of each of the Plaintiffs for a New Trial.

I reserved ruling on the question of the immunity of the Defendants, State of Mississippi and City of Jackson, and at this time the Court rules that in the event that it is mistaken in any regard in its foregoing action in overruling these motions, it is of the opinion that the State of Mississippi was and is immune from suit in this case by virtue of the Eleventh Amend

to the United States Constitution and Hans v. Louisiana and its progeny as well as under the Mississippi Constitution and that it could not be sued in Federal Court by citizens of the same state or other states. Furthermore, the City of Jackson is and was immune from this type suit because the City is not a "person" within the meaning of the Civil Rights Act under the greater and better weight of authority. Also, under State law, it was performing a governmental, as distinguished from a proprietary, function and that it was immune from suit for that reason under the established law of the State of Mississippi. I think I owe it to counsel and to the Appellate Courts in the event this case is appealed, to state my views with respect to the question of immunity at this time.

An appropriate order conforming to the foregoing shall be presented to the Court within five days, approved as to form by Counsel for all sides.

The Court reserves the right to edit, revise and correct this oral bench opinion in the event Counsel requests the reporter to transcribe it.

This will constitute the ruling of this Court on those Motions which I have considered here today and if there is no further business to come before the Court, Court is adjourned. (COURT ADJOURNED)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NOS. 4740, 4997

MYRTLE GREEN BURTON, ET AL,
Plaintiffs.

v.

JOHN BELL WILLIAMS, ET AL,
Defendants.

COURT REPORTER'S CERTIFICATE

I, Robert L. Daniels, Jr., Official Court Reporter, in and for the United States District Court for the Southern District of Mississippi, hereby certify that the foregoing 7 pages contain a true and correct transcript of the Oral Opinion and Ruling of the Court on Motions for a Judgment Notwithstanding the Verdict and for New Trial, had in this cause on the 5th day of April, 1972, as recorded and transcribed by me to the best of my skill and ability.

Witness my signature, this the 16th day of April, 1972.

Robert L. Daniels, Jr.,
Official Court Reporter.

APPENDIX E

(Additional Grounds For Reversal)

1. The failure of the Court of Appeals to reverse on the ground that the law enforcement officers' violation of their own training and regulations constituted wrongful conduct as a matter of law. RESTATEMENT (SECOND) OF TORTS § 286 (1965); *Underwood* v. *United States,* 356 F.2d 92, 98-99 (5th Cir. 1966); *Daniels* v. *Adkins Protective Serv. Inc.,* 247 So. 2d 710, 712 (Miss. 1971); *Robertson* v. *Yazoo & M.V.R.R.,* 154 Miss. 182, 187-88, 122 So. 371, 372 (1929).

2. The failure of the Court of Appeals to reverse on the ground that the jury should have been instructed that the uncontroverted testimony of national and local experts in crowd and sniper control established the standard of care the officers should have adhered to. W. PROSSER, LAW OF TORTS, § 33 at 166 (4th ed. 1971); *Rhode Island Hosp. Trust Nat'l Bank* v. *Swartz, Bresenoff, Yavner & Jacobs,* 455 F.2d 847, 852 (4th Cir. 1972).

3. The failure of the Court of Appeals to reverse on the ground that, by not instructing all officers present (except the predesignated sniper team) that they must not fire without a command, each supervisor acted wrongfully as a matter of law. RESTATEMENT (SECOND) OF TORTS § 315(a) (1965); *Roberts* v. *Williams,* 456 F.2d 819, 822-23 (5th Cir.), *cert. denied,* 404 U.S. 866 (1971); *modified,* 456 F.2d 834 (5th Cir. 1972) (addendum).

4. The failure of the Court of Appeals to reverse on the ground that certain supervisory officers participating in the firing acted wrongfully as a matter of law by not joining the detachment commander and others in ordering "cease fire", and instead, by their disobedience of those orders, encouraging others to disobey the orders and begin or continue firing. RESTATEMENT (SECOND) OF TORTS

§ 315(a) (1965); *Roberts* v. *Williams,* 456 F.2d 819, 822-23 (5th Cir.), *cert. denied,* 404 U.S. 866 (1971), *modified,* 456 F.2d 834 (5th Cir. 1972) (addendum).

5. The failure of the Court of Appeals to reverse on the ground that the jury could not properly have found that the firing was "justified" in "self defense" because, to so find, the jury was also required to find under the District Court's instruction that the petitioners or their decedents "were assaulting the defendants" or were "present and aiding and encouraging said assailants and imminently endangering the life or safety of the . . . defendants or imminently threatening them with great bodily harm" and there is no evidence which would support either finding. *Sinclair Refining Co.* v. *Tompkins,* 117 F. 2d 596, 598 (5th Cir. 1941).

6. The failure of the Court of Appeals to reverse on the ground that the District Court did not instruct the jury that the officers who fired had the burden of proving that their firing was entirely without fault. *State ex. rel. Johnston* v. *Cunningham,* 107 Miss. 140, 65 So. 115 (1914).

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
FEB 11 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-875

MYRTLE GREEN BURTON, Individually and in Her Capacity As Representative of JAMES EARL GREEN, Deceased, et al.,

Petitioners,

vs.

WILLIAM L. WALLER, Individually and As Governor of the State of Mississippi, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SEPARATE BRIEF FOR RESPONDENTS, CITY OF JACKSON AND ITS EMPLOYEES IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SEPARATE BRIEF FOR RESPONDENTS, CITY OF JACKSON AND ITS EMPLOYEES IN OPPOSITION

This brief in opposition to the Petition for a Writ of Certiorari herein is filed on behalf of the Respondents, City of Jackson, Mississippi; Warren Magee, a Lieutenant of Jackson Police Department and Billy Dwight Till, Robert Gibson Austin, David Carl Penson, Wayne L. Simpson, Jr., and Billy Hinton Rowzee, police officers of the City of Jackson.

OPINION BELOW

A copy of the opinion delivered in the court below is attached to the petition herein as Appendix C.

JURISDICTION

These Respondents do not question the jurisdiction of this Court.

QUESTIONS PRESENTED

The statement by Petitioners as to the questions presented is inaccurate and misleading, insofar as these Respondents are concerned. As to them, the questions are:

1. Whether a jury verdict exonerating from liability, the 5 above named police officers of the City of Jackson whose only complained of act on the occasion in question was the firing of their weapons almost straight into the air, in accordance with their training in riot control, is to be overturned by this court.

2. Whether a jury verdict in favor of Police Lieutenant Warren Magee, a supervisory officer in charge of the combined detail of police officers and highway patrolmen, is to be set aside by this court, when the only complained of acts by him, on the occasion in question, is that he did not advise the highway patrolmen of the riot control procedures of the City Police and was not familiar with the Highway Patrol riot control procedures.

3. Whether a jury verdict in favor of the City of Jackson is to be set aside by this court, when the only charge against it is that, on the occasion in question, it was the employer of Lieutenant Magee and the 5 named police officers; and that the highway patrolmen became its borrowed servants.

STATEMENT OF THE CASE

Petitioners' statement of the case (Brief pages 8-20) as applied to these Respondents, is inaccurate, misleading, unfair and prejudicial.

1. The 5 police officers.

There is not a syllable of testimony in the record to suggest:

(a) That any one of the 5 Jackson police officers "panned" the crowded women's dormitory by raking it with gun fire, or that they fired their weapons in any manner, except into the air.

(b) That the training of these 5 police officers was contrary to any generally accepted standard, or that the firing of their weapons almost straight into the air, was not an accepted procedure in riot control.

On the contrary, the undisputed evidence shows:

> "Only five JPD policemen fired their weapons. They discharged their shotguns into the air at an angle of about 85 or 90 degrees, firing a total of seven rounds of number 1 buckshot." (Opinion page 1270)
>
> * * *
>
> "At the threshold, there was no error in denying the motions for directed verdicts against the five JPD officers who fired. Under the undisputed evidence all of them shot into the air at an angle approaching 90 degrees. A jury could find that their action was an acceptable procedure for meeting a riot situation without undue risk of harm to persons at the scene and that they were guilty of no tortious conduct." (Opinion page 1281)

And, on the trial of the case, petitioners admitted that this was a jury question. Thus, Mr. Mullen, one of their attorneys, said:

> "* * * There isn't any testimony that any defendant fired to suppress a riot, that I know of in the case, and if there is any such testimony it relates only to the firing by the Jackson Police Officers in the air. NOW, I will concede that it is possible for the jury to find that they were following their riot control instructions when they fired into the air and from the testimony that's in the record, I understand that firing into the air is a crowd control rather than an anti-sniper measure. So, with respect to those officers I think the instruction might properly be given as to whether they were negligent in firing without actually hearing an order to fire, but with respect to everyone else, their testimony is that they were firing at something. * * *" (T. p. 3276)

2. Lieutenant Magee

> "All supervisory officers on the scene are claimed to have failed to perform various command functions: Lt. Magee (in charge of the detachment), failure to inform all officers to load and fire only upon command, failure to be familiar with MHP procedures on crowd control; * * *
>
> All of these alleged failures raised jury questions and could not be the basis for directed verdicts." (Opinion pages 1284-1285)

3. The City of Jackson

In addition to immunity (Opinion pp. 1273-1274) all disputed factual issues were resolved against petitioners by the jury's verdict.

ARGUMENT

We think it is thoroughly well settled that in determining the liability, vel non, of these Respondents, generally accepted principles of tort law are controlling; both as to the civil rights claim under Section 1983, and as to the pendent claim under State law. *Monroe* v. *Pape*, 365 U.S. 167, 5 L.Ed.2d 492; *Pierson* v. *Ray*, 386 U.S. 547, 18 L.Ed.2d 288; *Nesmith* v. *Alford*, 318 F.2d 110 (5th Circuit); *Whire* v. *Kern*, 407 F.2d 781 (5th Circuit); *Anderson* v. *Nosser*, 438 F.2d 183 (5th Circuit); *Anderson* v. *Nosser*, 456 F.2d 835 (5th Circuit); *Roberts* v. *Williams*, 456 F.2d 819 (5th Circuit).

The trial Judge properly instructed the jury:

1. As to the 5 police officers who fired, that the highest degree of care is imposed upon persons handling firearms, and as law enforcement officers, they are held to a higher degree of care than are ordinary citizens; that in determining the standard of care to be exercised by them on the occasion in question, the jury should consider the evidence respecting their training rules, their regulations and procedures for crowd and riot control, as well as the expert testimony as to what are proper riot and crowd control procedures in a situation such as existed on the occasion in question; all of which should be considered by the jury in determining whether, or not, the firing was negligent or wrongful. (T. pp. 3198-99)

Being properly instructed as to the applicable law, the jury returned its general verdict for these Respondents.

2. As to Lieutenant Magee, that if they found him to be under the duty to instruct the highway patrolmen in his combined detail, as to the training, rules and regula-

tions of the Jackson Police Department, and had a reasonable opportunity to do so, but failed so to do, and by reason thereof the petitioners were harmed, then he was liable. (T. p. 3210)

Being so properly instructed as to the law, the jury returned its general verdict in favor of Lt. Magee.

3. The trial Judge having reserved the question of immunity of the City of Jackson, submitted to the jury the issue of its liability, on full and accurate instructions as to the doctrine of Respondeat Superior, and as to the elements necessary to make the highway patrolmen the borrowed servants of the City. (T. pp. 3213-3216, 3303-3304) *Mississippi Export Railroad* v. *Temple*, 257 So.2d 187 (Miss.); *Rodicker* v. *Railroad*, 236 So.2d 414 (Miss.); *St. Louis-San Francisco Railroad* v. *Porter*, 211 So.2d 530 (Miss.); *Standard Oil Company* v. *Anderson*, 212 U.S. 215, 53 L.Ed. 480; *Shenker* v. *B & O Railroad Company*, 374 U.S. 1, 10 L.Ed.2d 709.

Being so properly instructed as to the law, the jury returned its general verdict in favor of the City.

On motion of petitioners for Judgment Non Obstante Veredicto, the trial judge decided the reserved question of immunity and ruled that under the Civil Rights Act the City was immune from suit, it not being a person within the meaning of the Act; and under State law, it was also immune from suit because on the occasion in question it was performing a governmental function. That such ruling is correct cannot be subject to serious debate. *Monroe* v. *Pape*, 365 U.S. 167, 5 L.Ed.2d 492; *City of Kenosha* v. *Bruneau*, 412 U.S. 507, 37 L.Ed.2d 109; *Anderson* v. *Vanderslice*, 240 Miss. 55, 126 So.2d 522; *Twiner* v. *Jenkins*, 257 So.2d 488; *Simpson* v. *Poindexter*, 241 Miss. 854, 133 So.2d 286; *City of Hattiesburg* v. *Buckalew*, 240

Miss. 323, 127 So.2d 428; *Bates* v. *City of McComb,* 181 Miss. 336, 179 So. 737.

CONCLUSION

It is respectfully submitted that petitioners have wholly failed to sustain their burden of establishing under Rule 19 that there are special and important reasons why the Writ prayed by them should be granted. Certainly, as to these Respondents the decision below did not involve important questions of Federal law which have not been, but which should be settled by this court; nor does it decide federal questions in conflict with applicable decisions of this court or of any other Court of Appeals. On the contrary, it involves principles of tort law which have been well established for many years.

The petition should be denied.

Respectfully submitted,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS, STATE DEFENDANTS

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-875

MYRTLE GREEN BURTON, INDIVIDUALLY AND IN HER CAPACITY AS REPRESENTATIVE OF JAMES EARL GREEN, DECEASED, ET AL.,

Petitioners,

vs.

WILLIAM L. WALLER, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SEPARATE BRIEF FOR RESPONDENTS, STATE OF MISSISSIPPI AND ITS EMPLOYEES IN OPPOSITION

This brief in opposition to the Petition for a Writ of Certiorari herein is filed on behalf of the Respondents, State of Mississippi; Giles Crisler, Mississippi Commissioner of Public Safety; and, thirty-nine individual officers of the Mississippi Highway Safety Patrol.

OPINION BELOW

A copy of the opinion delivered in the Court below is attached to the Petition herein as Appendix C.

JURISDICTION

The jurisdiction of this Court has been invoked under 28 U.S.C. §1254(1). Reliance upon this section is misplaced. Rule 19 of the Supreme Court Rules, concerning the grant of certiorari, embodies the criteria by which the Court determines whether a particular case merits consideration, with due regard to the power to which the Court is confined, decisively restricted through the creation of the intermediate Court of Appeals. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955). Special and important reasons which may justify the grant of a writ of certiorari under Rule 19 imply a reach to a problem beyond the academic or the episodic; this does not exist here where review is sought of the evidence and inferences drawn from it. The Supreme Court has held that it would not grant a writ of certiorari for such purposes. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 58 S.Ct. 849, 82 L.Ed. 1273 (1938). Jurisdiction should be denied.

QUESTIONS PRESENTED

The statement by Petitioners as to the questions presented is an inaccurate and misleading continuum which these Respondents reject out of hand. This is nothing more than an attempt by Petitioners to retry this case in this Court. Such a course is violative of the Seventh Amendment to the Constitution of the United States.

The only question before this Court in this tort action is:

Whether a jury verdict exonerating from liability all the named Defendants and upheld by the Court of Appeals is to be overturned as a matter of law.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Seventh Amendment hereinafter set forth:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

The complained of events which resulted in the bringing of this action have been "untangled as painstakingly as we are able" (502 F.2d 1265) by the Court of Appeals for the Fifth Circuit and are set forth in its opinion, pages 1266-1270. It could serve no useful purpose to reiterate isolated facts here inasmuch as the dispositive issues are drawn from a more general overview.

The president of Jackson State described the scene which confronted those charged with the responsibility of keeping the peace, the Defendants, as they entered the campus to fulfill their responsibility:

> "On Yesterday evening, May 13, we had another what has become [sic] the annual riots at Jackson State College. This latest riot was perpetrated by a face-

> less, mindless mob of students and non-students bent on doing violence and destruction to the college and doing bodily harm to our own counselling personnel as well as to unsuspecting passersby. Considerable damage was done to the college property, mainly in the form of glass breakage. Two trailers used to haul garbage from dormitories and the dining hall were burned. Also a very determined attempt was made to incinerate Barracks 1-A . . . ." 502 F.2d 1268.

That there was a "riot" on the campus of Jackson State has not been denied. That these particular Respondents, along with numerous city, county and federal officers, went to the campus and joined hands with campus security officers for the purpose of quelling that riot is not contested. That the Petitioners were injured during the ensuing confrontation between the many law enforcement officers present, including these Respondents, and rioters is a rational inference. That no Petitioner suffered at the hands of these Respondents, or any of them, is the jury's verdict, supported by ample evidence. That other officers present were not parties to this suit was a choice exercised for reasons best known to Petitioners.

The culmination of the two nights of rioting, that had left extensive property damage at the hands of the rioters, was less than half a minute's duration. The Court of Appeals recounted it thusly:

> "Shortly after the contingent had halted and when the crowd in the courtyard numbered about 400 students, a sound resembling the report of a small caliber pistol was heard. There is sufficient evidence, in the form of testimony by many officers and by newsmen, from which the jury could find that at that time the officers were fired upon by a sniper, thus hereinafter we state as fact that a sniper existed and that he fired.

A newsman who was in the area testified: 'Shortly after we arrived I began shooting film, and it was soon after that I felt a bottle shatter at my foot, sprayed my ankle with glass. I heard a report; a bullet went past my ear and I heard it ricochet off the wall behind me.' An MHP officer testified that he saw a black male break out the western pane of the third window from the bottom of West Wing of Alexander Hall, and fire two shots in his direction from a handgun. At least 18 patrolmen testified to seeing two or three muzzle flashes come from the eastern pane of the same window. Other patrolmen saw muzzle flashes in either one of the upper windows or at the top of Alexander Hall, and a score of additional policemen and patrolmen heard shots from the general vicinity of Alexander Hall. At or about this time a patrolman and a JPD officer were struck by thrown bricks and knocked down.

Several patrolmen or policemen cried 'sniper' or 'sniper third floor' or 'sniper third window.' " 502 F.2d 1269-70.

At page 12 of the Petition the absurd statement is made that "any testimony about a sniper cannot be credited." This flies in the face of the position of the Petitioners taken in the Court of Appeals. That Court in its opinion in footnote 3 stated, "Plaintiffs concede that the jury could so find 'that at that time the officers were fired upon by a sniper,' thus hereinafter we state as fact that a sniper existed and that he fired." 502 F.2d 1269.

The FBI made an exhaustive investigation of the Jackson State shootings and detailed study of the effects of the barrage. 502 F.2d 1271. The testimony of the FBI agents set forth the results of that investigation and established that the firing originated "where the MHP patrol-

men had been clustered." Id. Thus, the testimony of these Respondents was corroborated as to their direction and plane of fire and the practical impossibility of their having injured the Petitioners.

It should be noted that with respect to the seven specific Defendants which the Court of Appeals singled out for whatever reason, even these seven Respondents were exonerated by the jury and this was found proper. 520 F.2d 1282. Specifically, the Court of Appeals said, "The proof did not establish as a matter of law that any one or more of them [the seven singled out] inflicted the harm suffered by any one or more of the victims whose claims are before us." Indeed, it could have been no other way for, by the uncontradicted testimony of these particular officers, shots fired by them could not have caused any of the injuries complained of with the possible exception of the Petitioner, Tuwaine Davis Whitehead, who places herself in the position of the sniper. There simply is a void in the evidence as to any "causation."

It appears to be the position of Petitioners that since certain of these Respondents fired their weapons on the night in question and that inferentially these Petitioners were injured on that night then, *ipse dixit*, these Respondents are liable in damages regardless of whether or not they were the proximate cause of the injuries complained of by the Petitioners. It should here be noted that as previously pointed out the record shows that there were many other law enforcement officers present on the night in question who were equipped with firearms and were in a position to and had an opportunity for causing the complained of injuries. None of these individuals was made a party Defendant in this action. Moreover, the record reflects that individuals other than law enforcement officers were on the campus armed with firearms and firing them.

Furthermore, twenty city policemen and four Highway Patrolmen who were made party Defendants and who were present and armed with firearms of an identical nature as those of these Respondents were voluntarily dismissed with prejudice by the Petitioners upon their mere assertion that they had not fired their weapons at the time in question. This dismissal was effected even though these individuals so armed were in a position and had an opportunity to have caused the complained of injuries. It is incongruous that while Petitioners accepted the unsupported assertions of these twenty-four individuals they now characterize the testimony of these Respondents given under oath and subject to cross examination as being devoid of the truth.

On page 10 of the Petition, Petitioners attempt to mislead this Court by implying that the Petitioners proved their case by offering the testimony "of 96 witnesses, including eleven Jackson State students and 69 officers at the scene." This is an obvious attempt to mislead this Court since Petitioners do not inform the Court that the sixty-nine officers were in fact the Defendants in this action including the remaining Respondents who were called as adverse witnesses. None of these sixty-nine officers testified in any manner which would in any way support the position of the Petitioners. As proof that this was not just an innocent mistake on the part of Petitioners they add a footnote telling this Court that "Defendants offered the testimony of only two witnesses, who added little, if anything, to the testimony previously presented by the Plaintiffs." This statement could only have been made to willfully mislead this Court since the writer of this Petition knew that all of the Defendants testified in their own behalf and in support of their defenses after being examined by Petitioners. This was done in the interest of judicial economy and with the approval of the trial court

rather than recalling each of them after the close of the Plaintiffs' case.

At page 2 of their Petition, the Petitioners make reference to "an all-white jury" apparently implying the absence of blacks on the venire from which the panel was selected. This simply is an untruth; there were numerous blacks among the venire from which the trial jury was selected. In any event, "race" is not at issue here for, while the insinuation is made in the Petition, the trial jury was never challenged. Moreover, the Petitioners moved the trial court for a change of venue from the Jackson Division of the United States District Court for the Southern District of Mississippi, where the incident occurred and the majority of the parties reside, and which has a black-white ratio of 40-60 according to the 1970 census. The change of venue was granted over the objection of the Respondents.

Perhaps, the more succinct statement of this case is that made by the Court of Appeals as its "Conclusion."

> "We summarize the key points controlling ultimate disposition of this case. There was evidence on which the jury could find there was sniper fire and plaintiffs so concede. Under the governing Mississippi law of privilege, and with respect to most of the officers who fired, there was sufficient evidence to submit to the jury as to whether the respective officers were privileged to fire in self defense or to suppress a riot, and, if privileged, whether nevertheless they employed excessive deadly force or fired without due regard to the safety of others. With respect to a few officers, the evidence established that they were guilty of tortious conduct as a matter of law, but the question of whether any one or more of them was an actual cause of harm to any plaintiff was for the jury. Liability of supervisory and command officers was a jury issue. The

State of Mississippi and the City of Jackson were immune from suit. There was no error in the jury charges.

Our conclusions make it unnecessary for us to discuss questions concerning assumption of risk, alleged immunity of individual officers from suit, and alleged liability of Crisler on respondeat superior grounds for tortious acts of individual officers.

This case was correctly submitted to the jury for decision. The jury has spoken, and the judgment entered on its verdict must be and is affirmed." 502 F.2d 1286.

ARGUMENT

The Supreme Court of the United States, speaking through Mr. Justice Douglas, in *Atlantic and Gulf Stevedores* v. *Ellerman Lines*, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed. 2d 798 (1962), correctly stated the proposition which is now urged upon the same Court by these Respondents:

> "We might agree with the Court of Appeals had the questions of the fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.'" 369 U.S. 359-60.

The position adopted by the Petitioners, and rejected by the District Court and Court of Appeals, would have the Court "search for one possible view of the case which will make the jury's finding inconsistent." 369 U.S. 364.

Such a position "results in a collision with the Seventh Amendment." Id.

In accord with this teaching of *Atlantic and Gulf Stevedores,* we point out that the Court of Appeals after "painstaking" inquiry found that: "This case was correctly submitted to the jury for decision." 502 F.2d 1286.

In *Lavender* v. *Kurn*, 327 U.S. 645, 90 L.Ed. 916 (1946), this Court was asked to review evidence and draw inferences contrary to those drawn by a jury. In answer to that request the Court responded thusly:

> "The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. (Citations Omitted).
>
> It is no answer to say that the jury's verdict involved speculation and conjecture." 327 U.S. 652-53.

In the case sub judice, as in *Lavender,* the Petitioners would have this Court review the evidence toward the end of drawing inferences more to their liking. The short answer to such a request must be that they are "not free to relitigate the factual dispute in a reviewing court."

IMMUNITY

Petitioners have made much ado over an imagined issue as to the vitality of the Eleventh Amendment to the Constitution of the United States. While the Respondents do not recognize this as an issue it is nevertheless ad-

dressed to further allay any possible question as to the proper disposition of the Petition.

The trial court allowed the issue of the State's liability to these Petitioners to go to the jury reserving a ruling on the question of immunity until their decision was reached on liability. It was after the jury returned its verdict of no liability that the trial court correctly held the State to be immune.

The Court of Appeals cited more than ample authority for the immunity of the State and a listing here is unnecessary. 502 F.2d 1273-74.

CONCLUSION

Upon the facts presented in this case a jury has laid to rest the riots of 1970, therefore, this Court should not exhume them through the office of certiorari. The Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

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IN THE

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OCTOBER TERM, 1974

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Petitioners,

v.

WILLIAM L. WALLER, Individually and as Governor of the State of Mississippi, et al.,

Respondents.

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REPLY MEMORANDUM FOR PETITIONERS

The briefs filed in this Court by the State of Mississippi respondents (the State, its highway patrolmen and its Commissioner of Public Safety) and the City of Jackson respondents (the City and its police officers) reconfirm the reasons why this Court should grant certiorari and reverse the judgment of the Court of Appeals:

1. The briefs in opposition to the writ neither acknowledge nor mention the conclusions of the Court of Appeals. The Court found that the officers' firing was "an excessive cumulated use of deadly force" "beyond the physical limits of [any] justifiable response" (502 F. 2d at 1272) which was "uniformly rejected as unacceptable" by all expert law enforcement testimony on

the subject (*id.*) and was the result of "a confused mass reaction during which, as the supervisory officers acknowledged, they lost control of the men under their supervision" (at 1285). The Court's conclusions of respondents' wrongdoing are unassailable; the best proof of their validity is that the respondents advance no contrary view. It is those conclusions, based upon "all reasonable inferences in favor of defendants" (at 1266), which make erroneous the inconsistent result reached by the Court of Appeals: that no person or entity is liable for this wrongdoing.

2. The cornerstone of the defense lies in respondents' continuing to seek refuge in the fact that it is impossible to tell which officer shot which of the petitioners or their decedents because so many officers fired so many shots. The thesis, an abhorrent one, apparently remains that if wrongdoing reaches some overwhelming order of magnitude it becomes not remediable.

3. The irresponsible rhetoric employed in the State's brief is disturbing, to say the least. In telling this Court it should not exercise jurisdiction over this case, the State urges that the "problem" here is "academic" or "episodic" (at 2). When has it ever been "academic" or "episodic" to this Court that black citizens were killed and wounded by state officers, who, in flagrant violation of petitioners' rights, shot up a black women's dormitory at midnight, panning it from top to ground with fire from shotguns, machine guns and rifles?

4. Unable to rebut the conclusions of the Court of Appeals that there was massive wrongdoing by law enforcement officers at Jackson State, respondents engage in a circular exercise of finger-pointing accusations;

each seeks to find someone else responsible for the tragedy. The city police say they were not responsible, suggesting the state police must have caused the deaths and woundings. The state police say they did not do it; they say the killing and wounding must have been done by either four of their fellow highway patrolmen who swore they did not fire, or by the city police, or by "numerous" Federal and county officers (whomever the State respondents are referring to, they were nowhere near Jackson State) and Jackson State security policemen (who were not involved in the shootings) (*see infra* at 4). The State and City argue they are immune from suit; hence, they claim no one is legally responsible for the wilful and wrongful acts of their agents.

5. Using language further demonstrating the State respondents' arrogant and continuing disregard for the rights of black citizens, the State respondents conclude their brief by saying:

> "Upon the facts presented in this case the jury has laid to rest the riots of 1970, therefore, this Court should not exhume them through the office of certiorari." (At 11)

This is callous nonsense. What is at issue here is whether federal courts will provide remedies for the violation of the highest of Federal rights. Those killed and wounded were part of a crowd which, as the Court of Appeals found, was " 'withdrawing from the street area and dispersing' " as the police commander at the scene was directing them to do (502 F. 2d at 1269). There was no need to use any kind of physical force against these people because, according to the police commander, " 'the people were complying with my request' " to

disperse (*id.*).* Petitioners do not ask this Court to "exhume" "the riots of 1970"; what we want reinstated is the rule of Federal constitutional law which says that killings and woundings such as these are intolerable and will not be countenanced in the future.

While the tone and substance of the State respondents' brief are the best answer to it, there are some fundamental errors in it which should be particularly noted and disposed of.

First, the State respondents assert that they should not be liable because "there were many other law enforcement officers present on the night in question who were equipped with firearms and were in a position to and had an opportunity for causing the complained of injuries" (at 6), naming "numerous city, county and federal officers", as well as "campus security officers" (at 4).

—*But:* There were no "federal" or "county" officers anywhere near the Jackson State campus, let alone participating in the shootings. There were Jackson State security officers in the area, but they were not involved. There is no evidence in the record to the contrary, and the State respondents accordingly cite none. That "federal" or "county" officers or security guards may have joined in the shootings is a complete fabrication made up by the State respondents.

Second, the State respondents assert that "individuals other than law enforcement officers were on the campus armed with firearms and firing them" (at 6).

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*Of course, petitioners Green, shot across the street, and Whitehead (and other women shot inside their dormitory) were not part of that crowd; they equally did not sacrifice a constitutional right by being where they were.

—*But:* The evidence is overwhelming that there was no firing at the officers by anyone (Petition, at 11-12). At the most, for purposes of seeking judgment notwithstanding the verdict, we will assume that a jury might have found that one lone "sniper" fired one or two shots at the officers before they opened up with their barrage. Plainly, as the volume, intensity and area covered by the firing demonstrate, the barrage principally originated from the area where the highway patrolmen were located and went well beyond "the physical limits of [any] justifiable response" (at 1272).

*Third, t*he State respondents find some "incongruity" (at 7) in our dismissing with prejudice the action against 24 officers (including four State highway patrolmen) who testified they did not fire. The State respondents suggest that the officers who denied firing, officers who include clients of the attorneys on their brief, might have been responsible for the tragedy.

—*But*: Even if there were wrongful firing by someone else, proof of more wrongful firing—set off by, or causing, still more wrongful firing—would not and could not exculpate the respondents' wrongful firing. In addition while it may be the case that the highway patrolmen who at trial denied firing perjured themselves, we have no way of knowing that.* As the Court of Appeals found, "they were

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*The only way to disprove a lie is by effective cross-examination, and the highway patrol and its counsel frustrated petitioners' ability to do that by, among other things:

(1) Conducting a closed and secret departmental "investigation" of the shooting. That "investigation" was conducted entirely orally with no records kept and no report written (Hearing, Apr. 2, 1971, Tr. at 23-24, Record on Appeal at 378). In fact, counsel for the Patrol flatly stated that they "purposefully made no

dropped as defendants for want of proof" (502 F. 2d at 1265).

The City policemen who testified they did not fire were dismissed with prejudice for the same reason as were the highway patrolmen. In addition to not having proof that any of them was lying, there was additional evidence that almost all the firing came from highway patrolmen, who

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reports" because "[w]e felt as though we would be investigated" and "our fears were borne out" (*id.*).

(2) The highway patrol, unlike the City police and Jackson State students, refused to provide any information to the Federal Bureau of investigation (Tr. 2857-59) and individual patrolmen were instructed not to make statements to anyone (*e.g.*, Tr. 1278, 1351-52). The highway patrol produced weapons for ballistics testing only when they were subpoenaed, and several patrolmen, responding to a subpoena calling for their weapons, deliberately held back the personal weapons they fired at Jackson State.

(3) When it first became apparent during discovery that documents relevant to this litigation had not been preserved by the highway patrol, petitioners moved the District Court for an order requiring such document preservation. The State respondents opposed the motion by taking what their counsel admitted was "an amazing position that [they had] no documents" (Tr. Hearing, Apr. 2, 1971, at 23, Record on Appeal at 378). A series of document preservation orders were entered by the District Court (April 19, 1971; May 14, 1971; August 10, 1971) and the State respondents subsequently produced copies of some, but not all, of the documents demanded (Affidavit of Petitioners' Counsel, Record on Appeal at 761).

(4) Many of the documents sought to be preserved had, however, already been "lost" by the time the orders were entered. These documents had previously been delivered to a Hinds County, Mississippi, grand jury, and the County District Attorney swore he returned them "to a member of the Mississippi Highway Patrol" in the Hinds County Courthouse (Affidavit, Record on Appeal at 545). The patrol claimed it was never able to indentify that patrolman or produce those papers. In another startling display of indifference, counsel for the State respondents attempted an explanation of their "loss":

> "I am not too sure whether [the District Attorney] said a uniformed officer or a member of the highway patrol. It could have been Game and Fish." (Hearing, Aug. 17, 1971, Tr. at 64, Record on Appeal at 1450)

were grouped together in the street in an area contiguous with but distinct from where the city policemen were located. Indeed, that evidence is summarized in the State respondents' brief as follows:

> "The FBI made an exhaustive investigation of the Jackson State shootings and detailed study of the effects of the barrage. 502 F. 2d 1271. The testimony of the FBI agents set forth the results of that investigation and established that the firing originated 'where the MHP patrolmen had been clustered'." (At 5-6)

In short, the Court of Appeals found that 38 highway patrolmen (502 F. 2d at 1265) and 5 City policemen (at 1270, 1273) fired, it found that the other City policemen did not fire (*id.*), nothing in the record supports a rational inference that the firing was committed by anyone in addition to the 43 officers who admitted firing, and if the State respondents know of any contrary proof, particularly any heretofore suppressed by them, they should come forward with it.*

Fourth, the State respondents say they "do not recognize . . . [immunity] as an issue" (at 10), despite the fact that it was "recognized as an issue" by the Court of Appeals and is recognized by the City of Jackson respondents. The State respondents mention the general jury verdict for all defendants in this part of their brief, perhaps meaning to suggest that there is some connection between it and their statement that they do not "recognize" the issue.

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*If an attorney representing the State respondents has reason to believe that one or more of his clients perjured himself, as an officer of this Court he has a duty to disclose that information. American Bar Association Disciplinary Rules 7-102(A)(4) and 7-102(B).

—*But:* Immunity is the only remaining barrier to entering judgment of liability against the State (and the City). The liability of the State and City was premised on the doctrine of respondeat superior, and, with respect to the City, the additional "borrowed servant" rule. The State and City could act only through their agents (the highway patrolmen in the case against the State, the highway patrolmen and City policemen in the case against the City). Since the jury returned a general verdict for all the agents, it returned a general verdict for their employers.

Now, however, the posture of the State and City is very different in light of the conclusions of the Court of Appeals. Viewing the evidence most favorably to all respondents, the Court of Appeals has held (i) the petitioners or their decedents were killed or wounded by agents of the State and City (302 F. 2d at 1264-65, 1271, 1284); (ii) seven highway patrolmen are "guilty of tortious conduct as a matter of law" (*id.* at 1286); and (iii) there was "an excessive cumulated use of deadly force".* Since it is abundantly plain that four of the five petitioners or their decedents were killed or wounded well outside "the physical limits of [any] justifiable response", and since the fifth petitioner, Mrs. Whitehead, was shot inside a women's dormitory where she had every right to be, the only question left in the case against the State and City is whether ancient and, we contend, inapplicable concepts of immunity should cancel the petitioners' Fourteenth Amendment rights and bar the petitioners from recovering damages.

*It is also established that the City had overall command and control of both the City police and the State patrolmen (*id.* at 1267-1269), and thus the factual basis for holding the City liable for the acts of its "borrowed servants", the patrolmen, has been established.

CONCLUSION

For the reasons stated in the opinion of the Court of Appeals, in our Petition for Writ of Certiorari and here—and because the briefs in opposition filed by the State and City respondents fundamentally support our position—this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

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